

**LATEST LAW REPORT  
FOR  
ADMINISTRATION  
IN  
HORTICULTURE  
DEPARTMENT**

**Vol-1**

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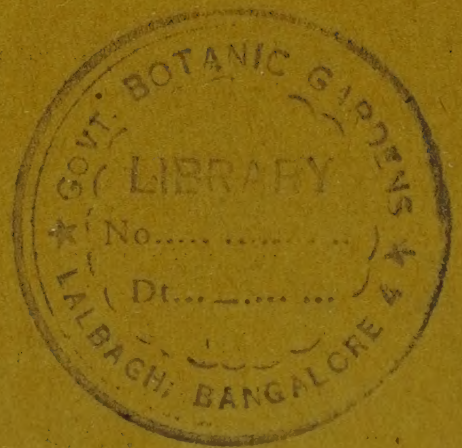
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Art. 141, Constitution of India



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# LATEST LAW REPORT for ADMINISTRATION in HORTICULTURE DEPARTMENT



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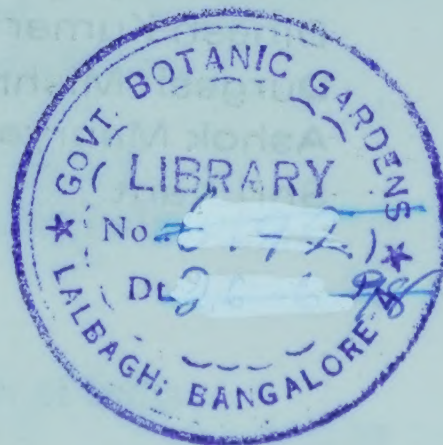
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IT IS THE ESSENCE OF DEMOCRACY  
TO OBEY  
NO MASTER BUT THE LAW



**OBSERVATION**

**Central Administrative Tribunals Act, 1985—Section 14 (2) —Petitioner employee of respondent society whether holds a civil post under the Union and can invoke the jurisdiction of Tribunal against his termination from service—(No)—Result—Record of the petition retransmitted to Delhi High Court.**

**OBSERVED BY**

**Mr. K. Madhava Reddy and**  
**Mr. Kaushal Kumar**  
**Hon'ble Members, Central Administrative Tribunal (Delhi).**

**IN**

**Regn. No. T-1195/85, decided on 4th April 1986, in the case of Shri Ram Sugarath Rai, Petitioner v. Indian Council of Agricultural Research and another, Respondents.**

**IMPORTANT POINT**

*Central Administrative Tribunal has no jurisdiction to entertain the grievance of an employee of a society unless notification envisaged under section 14 (2) is issued.*

**TEXT**

K. Madhava Reddy, Chairman—  
The petitioner herein, a watchman employee of Indian Agricultural Research Institute, New Delhi, seeks a writ of certiorari to quash the order of termination of his services vide order No. 13. 99/84-P-II dated 17th May, 1984, issued by the Joint Director (Admn), Indian Agricultural Research Institute, New Delhi, in pursuance of Sub-Rule (1) of Rule 5 of the Central Civil Services (Temporary Service) Rules, 1965.

2. Indian Agricultural Research Institute is managed by a Society Registered under the Societies Registration Act. The petitioner is an employee of that institute which is not a civil post under the Union. This Tribunal has no jurisdiction to entertain the grievance of an employee of a

Society or such an institution unless Notification envisaged by sub-section (2) of Section 14 of the Administrative Tribunals Act is issued : Until then the High Court continues to have jurisdiction to hear and dispose off his writ petition No. 1991 of 1985 and that Writ Petition does not stand transferred to this Tribunal under Section 29 of the Act. As this Tribunal has no jurisdiction to entertain the grievance of the petitioner at this juncture, the records of the cases be retransmitted to the Delhi High Court Registry. Parties to appear before the Registrar of the High Court on 24-4-1986 for further orders as to posting.

Petition transferred to High Court.



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### OBSERVATION

**Ad hoc appointment—Govt. issue circular for regularisation of services—Services—of petitioners terminated on expiry of term on basis of embezzlement—In the instant case allegations of serious misconduct against the petitioners and also the adverse entries in the service records of these petitioners were taken into consideration without giving them any opportunity of hearing and without following the procedure provided in Article 311 (2) of the Constitution of India—Orders terminating the services of the petitioners appellants on the ground that “the posts are no longer required” are made by way of punishment—Held on facts termination was by way of punishment and orders were illegal for non-compliance of Art. 311 (2) of Constitution of India.**

### OBSERVED BY

Mr. A. P. Sen and Mr. B. C. Ray  
Hon'ble Judges, Supreme Court of India

### IN

Civil Appeals Nos. 230 and 231 of 1982, decided on 7-5-1986 in the case of Jarnail Singh and others, Appellants v. State of Punjab and others, Respondents.

### TEXT

Ray, J. :—These appeals on special Leave are against the judgement and orders passed by a Division Bench of the High Court of Punjab and Haryana dismissing summarily the writ applications being Civil writs Nos. 476 and 484 of 1981 filed by the appellants on the ground that the orders terminating services of the petitioner did not attach any stigma to the service career of any of the appellants-petitioners, but they are made in terms of employment.

2. The appellants were appointed on ad hoc basis as surveyors on various dates between December 1976 to November 1977 through Employment Exchange. The terms of the order of appointment are quoted herein below :—

“The following officials are hereby appointed as Surveyors in the grade of

Rs. 140-6-170/8-210/10-300 up to 28-2-1977 or up to the date till the regular candidates are recommended by the Board, whichever is less on ad hoc basis and are posted under the officers mentioned against their names.

Their services can be dispensed with any time without any notice or reason. These candidates will have to produce their concerned certificate to the concerned officers before the submission of the joining report.”

3. The Government of Punjab in order to regularise the services of all the ad hoc employees who had completed the minimum period of one year's service on September, 1980 issued a Circular (Annexure 'B') to the effect that the services of the ad hoc employees shall be regularised on certain conditions men-



tioned therein. On being directed by respondents Nos. 3 and 4 the petitioner submitted the requisite documents to the authorities concerned for regularisation of their services. The service of the petitioners was, however, terminated with effect from 31-1-81 by the order of the Chief Conservator of Soils, Punjab, Chandigarh, respondent No. 2.

4. The crucial question requires to be decided in the instant appeals is whether the impugned order of termination of services of the petitioner can be deemed to be an innocuous order of termination simpliciter according to the terms and conditions of the services without attaching any stigma to any of the petitioners or it is one in substance and in fact an order of termination by way of punishment based on misconduct and made in violation of the procedure prescribed by Article 311 (2) of the Constitution of India. In other words when the order of termination is challenged as casting stigma on the service career, the Court can lift the veil in order to find out the real basis of the impugned order even though on the face of it the order in question appears to be innocuous.

5. In order to decide this issue, it is necessary to consider firstly the terms and conditions of appointment. The appointments of the petitioners are purely temporary and they have been appointed on ad hoc basis "up to a certain date or up to date till the regular candidates are recommended by the Board, whichever is later." It was also provided therein that their services can be discontinued with any time without any notice or

reason. The petitioners undoubtedly worked as Surveyors since the date of their appointment which in some cases (is) in December 1976 and in some cases on different dates between November, 1977 till 31st of January, 1981 when their services were terminated. In the order of termination it has been stated that "services of the employees are terminated with effect from 31-1-81 because these posts are no longer required". This order was made by the Chief Conservator of Soils, Punjab, respondent No. 2.

6. An affidavit has been sworn by Ashok Kumar, the petitioner No. 2, on 18th March 1981 along with an application for stay. In paragraph 3 of the said affidavit it has been specifically stated :—

"(a) That the petitioner No. 1 was accused of a shortage of Rs. 7317.50, vide communication No. 1965 dated 12-11-1979 received from Assistant Soil Conservation Officer, Budlada, District Bhatinda.

(b) That the deponent who is petitioner No. 2 was also accused of shortfall and a First Information Report dated 20-8-1980 (No. 2715) has been lodged against him with Police Station Nahiwala (District Bhatinda) in respect of the same.

(c) That Darshan Singh, the petitioner No. 6, was accused of shortages, Vide communication No. 10351 dated 3-10-1980 received from the Conservator of Soils, Ferozepur.

(d) That Satnam Raj, petitioner No. 8 was also accused of misappropri-



ations vide communication No. 10360 dt. 3-10-1980.

(e) That Ramesh Singh, petitioner No. 12 was accused of shortages to the tune of Rs. 14,000/- and was informed accordingly by the respondents.

(f) That similar allegations were made against the remaining petitioners and they were branded as incompetent and unfit for Government service. Adverse entries were also made in the Annual Reports.

7. In paragraph 4 of the said affidavit it has been further averred that the above facts are true and correct to the knowledge of the deponent. It has also been stated that the petitioners had prayed in the High Court to summon and scrutinize the official records which would have clearly indicated that the impugned orders of termination were based by way of punishment and cast stigma on the petitioners.

8. In the counter-affidavit sworn by C.M. Sethi, Chief Conservator of Soils, Punjab, Chandigarh on behalf of respondents No. 1 to 7 on April 4, 1981 the statements in paragraphs 3, 4 and 5 of the said affidavit have not at all been controverted. In paragraph 4 of the said affidavit it has been stated that annual/half yearly confidential reports were written on the work and conduct of all ad hoc employees including the petitioner in the department. It is not correct to say that they learnt of their adverse reports from the return filed in the High Court for the first time.

9. An additional affidavit verified by C. M. Sethi, Chief Conservator of

Soils, respondent no. 2 on January 15, 1982 was filed. It has been stated in paragraphs 3, 4 and 5 of the said affidavit :—

“The claim of the petitioner that their record is satisfactory and they have been performing their duties efficiently was denied in connection with their claim for regular appointment only and it was stated strictly in connection with their claim for regular appointment that some of them have adverse record and there are shortages/embezzlements and that the Departmental Selection Committee constituted by the Government did not recommend them as fit for regular appointment, in view of which they cannot be made regular. The petitioners are quoting that the information as a ground for termination of their services, out of context, which is not correct and is denied.

The services of the petitioners were terminated on the expiry of existing term of ad hoc appointment and not for the reason due to which they were found to be not fit for regular appointment by the Departmental Selection Committee.

According to the reports of the Field Officers the petitioners Sarvshri Natha Singh, Balbir Singh, Ram Chand, Darshan Singh, Dalbir Singh, Sat Pal, Nirmal Singh and Satnam Raj who had earned adverse reports during the years 1979-80 and up to 9/80 were duly conveyed the adverse entries. It is, therefore, denied that the adverse entries were not conveyed to them.”



10. An additional affidavit on behalf of the appellants has been sworn by Swinder Singh, one of the appellants on 8-8-84. In paragraph 4 of the said affidavit it had been averred that the following appellants were not communicated any adverse report : -

(i) Jarnail Singh, Appellant No. 1 in Civil Appeal No. 230/82.

(ii) Ashok Kumar, Appellant No. 2 in Civil Appeal No. 230/82.

(iii) Tajender Singh, Appellant No. 2 in Civil Appeal No. 231/82.

(iv) Nachhattar Singh, Appellant No. 4 in Civil Appeal No. 231/82.

(v) Bagga Singh, Appellant No. 7 in Civil Appeal No. 230/82.

(vi) Ramesh Singh, Appellant No.

12 in Civil Appeal No. 230/82.

(vii) Bura Singh, Appellant No. 5 in Civil Appeal No. 231/82.

(viii) Joginder Singh, Appellant No. 7 in Civil Appeal No. 231/82.

11. It has been stated in paragraph 5 :—

“That the above names of the Appellants who were not communicated any adverse reports are given in view of the fact that the Respondent State has maintained that Appellants were Communicated adverse reports in accordance with the Rules and they were not confirmed in view of these adverse entries in the Confidential Rolls of the Appellants.”

12. It has been stated in paragraph 6 of the said affidavit :—

Name of the Appellant	Date of Report	Date of communication of the report
1. Roop Chand	29-1-81	29/30-1-81
2. Nathha Singh	6-10-80	December 1980
3. Dalbir Singh	not known	24-1-1981
4. Darshan Singh	30-10-80	December 1980
5. Satnam Raj	25-10-80	December 1980
6. Nirmal Singh	not known	December 1980
7. Balbir Singh	not known	December 1980
8. Ram Chand Siv	not known	December 1980
9. Savinder Singh	28-10-80	End of January' 81
10. Sakttar Singh	25-10-80	December 1980
	(issued on 3-11-80)	
11. Partap Singh	27-10-80	December 1980
	(issued on 3-11-80)	
12. Sat Pal	25-10-80	2-1-1981
	(issued on 2-1-81)	
13. Tarsem Lal	24-12-80	End of January' 81.



“That, it is however admitted, that the following appellants were actually communicated adverse reports, as late and closer to their date of termination of their services, as is indicated in the table below :—

13. It has been stated in paragraph 7 of the said affidavit :—

“That the following persons who were recruited around the same time and were taken in service also earned adverse reports and faced charges of embezzlement, but have been retained and regularised in service in preference to the Appellants :—

- (1) Gurbux Singh s/o Sohan Singh
- (2) Mithoo Ram s/o Muleand Lal
- (3) Gurcharan Singh s/o Hazara Singh
- (4) Tulsa Singh s/o Surject Singh
- (5) Vinay Kumar Sawhney
- (6) Kabul Singh s/o Tara Singh
- (7) Daulat Ram s/o Gala Ram
- (8) Chander Prakash s/o Sunder Lal
- (9) Nirmal Singh s/o Sohan Singh
- (10) Gurbux Singh s/o Geja Singh
- (11) Jaswant Singh s/o Chanchal Singh
- (12) Ganda Singh s/o Hardit Singh
- (13) Boota Singh s/o Anokh Singh
- (14) Manmohan Sood s/o Arjun Singh

14. It has been stated in paragraph 8 of the said affidavit :—

“That there were other persons who were recruited later than the Appellants but continued to remain in service to the detriment of the Constitutional rights of

the Appellants.”

15. It has been stated in paragraph 10 of the said affidavit :—

“That the respondent State framed false cases of embezzlement against some of the appellants and till to date no proceedings have been taken, nor any inquiries instituted against, in regard to those cases.”

16. It has been stated in paragraph 13 of the said affidavit :—

“That the Screening Committee was presided over by the Chief Conservator of Soils, Punjab, Chandigarh Shri C.M. Sethi, under whose administrative control the Appellants' Confidential Record was written, and who has filed the Counter-Affidavit on behalf of the Respondents before this Hon'ble Court.”

17. In the affidavit verified by Pritam Singh, Chief Conservator of Soils, Punjab, Chandigarh on 22nd November 1984, it has been stated in paragraph 4 that :—

“It is wrong that there were adverse remarks against Sarvshri Jarnail Singh Romesh Singh and Bura Singh which were required to be communicated to them. In respect of others there were adverse remarks which were communicated through letter mentioned below :

(1) Sh. Ashok Kumar :— According to the record available adverse remarks were conveyed by the Conservator of Soils, Ferozepur to the Divisional Soils conservation Officer, Bhatinda vide letter No. 11427 dated 28-10-80 for its further



communication to the official concerned.

(2) Tejinder Singh : Adverse remarks were conveyed by the Conservator of Soils, Ferozepur to the Divisional Soil Conservation Officer, Bhatinda vide No. 11429 dated 27-10-80 for further communication to the official concerned.

(3) Nachhatar Singh :— Adverse remarks were conveyed by the Conservator of Soils, Ferozepur to the Divisional Soil Conservation Officer, Bhatinda, vide No. 10355 dated 3-10-80 for further communication to the official concerned.

(4) Joginder Singh :— Adverse remarks were conveyed by the Conservator of Soils, Ferozepur to the Divisional Soil Conservation Officers, Bhatinda vide No. 11813 dated 4-11-80 for further communication to the official concerned.

(5) Bagga Singh :— Communication reference is not available on record.

The services of the petitioner were terminated on the expiry of existing term of ad hoc appointment and not for the reason due to which they were found to be not fit for regular appointment by the Departmental Selection Committee.”

18. It has further been stated in paragraphs 6 and 7 of the said affidavit.

“That the adverse entries of the period varying from 10/80 to 1/81 have been communicated to them in December, 1980, January, 1981. As this period is nearer to their date of termination of services so they were to be communicated these remarks at that time only.

It is incorrect to the extent that the persons named below earned adverse remarks and had charges of shortages/embezzlement.

- (i) Mithu Ram s/o Mukan Lal
- (ii) Gurcharan Singh s/o Hazara Singh
- (iii) Kabul Singh s/o Tara Singh
- (iv) Daulat Ram s/o Gala Ram
- (v) Chander Parkash s/o Sunder Lal
- (vi) Gurbux Singh s/o Geja Singh
- (vii) Jaswant Singh s/o Chanchal Singh
- (viii) Ganda Singh s/o Hardit Singh
- (xi) Boota Singh s/o Anokh Singh
- (x) Manmohan Sood s/o Arjun Singh

However, in the case of remaining persons namely Sarvshri (i) Gurbux Singh, s/o Sohan Singh, (ii) Tulsia Singh s/o Surjit Singh, (iii) Nirmal Singh s/o Sohan Singh, (iv) Vinay Kumar s/o Shri Ram, there were adverse remarks against these persons and the Departmental Selection Committee examined their record of service and found them fit for regular appointment. The Departmental Selection Committee was fully competent to select or reject any of the candidates for regular appointment in accordance with the Government instructions on the subject.”

19. It has also been stated in paragraph 8 of the said affidavit that the Departmental Selection Committee in accordance with the Government instructions as contained in Government Notifi-



cation dated 28-10-1980 considered the cases of all eligible person including the appellants and the persons cited in the list for appointment on regular basis and the appellants were not found fit for appointment on regular basis by the Committee. Thus the appellants were afforded full opportunity to compete and as such no constitutional right of the appellants was infringed.

20. It thus appears on a consideration of the averments made in the affidavits verified on behalf of the petitioners as well as on behalf of the respondents that the impugned order of termination of service of the petitioners had been made on the ground that there were adverse remarks in the service records of the petitioners as well as there were serious allegations of embezzlement of funds against some of the petitioners. It is quite clear that on consideration of all these adverse entries in the service record as well as serious allegations relating to misconduct, the petitioners were not considered fit by the Departmental Selection Committee to recommend the petitioners for regularisation of their services as Surveyors. The impugned orders of termination of Services of the petitioners are really made by way of punishment and they are not termination simpliciter according to terms of the appointment without any stigma as wrongly stated. It is undisputed that the respondents Nos. 2 and 3 did not follow the mandatory procedure prescribed by Art 311 (2) of the Constitution in making the purported orders of termination of services of the petitioners on the ground of misconduct

and thus there has been a patent violation of the rights of the petitioners as provided in Art 311 (2) of the Constitution. There is no room for any doubt that the impugned orders of termination of services of the petitioners had been made by way of punishment as the allegations of embezzlement of funds as well as adverse remarks in the service records of these petitioner were the basis and the foundation for not considering the petitioners to be fit for being regularised in their services in accordance the Government Circular dated October 28, 1980. Therefore, it is clear and evident in the context of these facts and circumstances of the case that impugned order of termination though couched in the innocuous terms as being made in accordance with the terms and conditions of the appointment, yet the impugned orders of termination of services of the petitioners were in fact made by way of punishment being based on the misconduct. There is also no denial of the specific averments made in the paragraph 8 of the Additional Affidavit sworn by one of the appellants Swinder Singh on August 8, 1984 that persons who were recruited later than the appellants were allowed to continue and to remain in service to the constitutional rights of the appellants. The impugned order of termination was, therefore, also assailed on the ground of discrimination, infringing Arts 14 and 16 of the Constitution of India.

21. It is vehemently urged on behalf of the respondents that the orders of termination have been made in accordance with the terms of the ad hoc appointment of the petitioners which provided that their services can be terminated at any



time without assigning any reason and as such the impugned orders could not be assailed on the ground of attaching any stigma to the service career of the petitioners. It has also been urged that where the impugned order is per se innocuous and it is made in accordance with the terms of the appointment, the Court should not delve into the circumstances which were taken into consideration by the authorities concerned in making the order. In other words It has been urged that in such cases it is not for the Court to enquire into the basis of the order and to see if the same was in fact made by way of punishment having evil consequences or not.

22. The petitioners are undoubtedly temporary ad hoc employees having no right to the posts they hold. In the case of *Parshotam Lal Dhingra v. Union of India*, 1958 SCR 328 : (AIR 1958 SC 36) it has been observed by the Court as follows—

“In short, if the termination of service is founded on the right flowing from contract or the service rules then, prima facie, the termination is not a punishment and carried with it no evil consequences and so Art. 311 is not attracted. But even if the Government has, by contract or under the rules, the right to terminate the employment without going through the procedure prescribed for inflicting the punishment of dismissal or removal or reduction in rank, the Government may, nevertheless, choose to punish the servant and if the termination of service is sought to be founded on mis-

conduct, negligence, inefficiency or other disqualification, then it is a punishment and the requirements of Art. 311 must be complied with.....”

23. In the case of *State of Punjab v. Sukh Raj Bahadur*, (1968) 3 SCR 234 : the following propositions were laid down by this Court while considering the question whether in case of termination of service of a temporary servant or a probationer, Art. 311 (2) of the Constitution would be affected or not. The propositions are as follows :-

“1. The services of a temporary servant or a probationer can be terminated under the rules of his employment and such termination without anything more would not attract the operation of Art. 311 of the Constitution.

2. The circumstances preceding or attendant on the order of termination have to be examined in each case the motive behind it being immaterial.

3. If the order visits the public servant with any evil consequences or casts an aspersion against this character or integrity, it must be considered to be one by way of punishment, no matter whether was a mere probationer or a temporary servant.

4. An order of termination of service in unexceptionable form preceded by an enquiry launched by the superior authorities only to ascertain whether the public servant should be retained in service does not attract the operation of Art. 311 of the Constitution.



5. If there be a full-scale departmental enquiry envisaged by Art. 311 i. e. an Enquiry Officer is appointed, a charge-sheet submitted, explanation called for and considered, any order of termination of service made thereafter will attract the operation of the said article."

24. This decision was considered by this court the case of *State of Bihar v. Shiva Bhikshuk Misra*, (1971) 2 SCR 191 in connection with the reversion of an officiating Subedar Major to his substantive post of Sergeant. In that case the respondent held the substantive post of Sergeant in the Bihar Police Force till July 31, 1946. On August 1, 1946 he was promoted to the higher post of Subedar. In January 1948 he was further promoted to officiate temporarily as Subedar Major. In October 1950, the Commandant of the Bihar Military Police, Muzaffarpur wrote to the Deputy Inspector of Police, Armed Forces suggesting that it should be censured for having assaulted an orderly. Thereafter, the Inspector General of Police reverted the respondent to the post of Sergeant. The said order of reversion was challenged and it was held by this Court that :

"So far as we are aware no such rigid principle has ever been laid down by this Court that one has only to look to the order and if it does not contain any imputation of misconduct or words attaching a stigma to the character or reputation of a Government Officer it must be held to have been made in the ordinary course of administrative routine and the Court is debarred from looking

at all the attendant circumstances to discover whether the order had been made by way of punishment. The form of the order is not conclusive of its true nature and it might merely be a cloak or camouflage for an order founded on misconduct. It may be that an order which is innocuous on the face and does not contain any imputation of misconduct is a circumstance or a piece of evidence for finding whether it was made by way of punishment or administrative routine. But the entirety of circumstances preceding or attendant on the impugned order must be examined and the overriding test will always be whether the misconduct is a mere motive or is the very foundation of the order."

25. The order of reversion was held to be by way of punishment and as such was set aside.

26. In the case of *State of U. P. v. Sughar Singh*, (1974) 2 SCR 335 a permanent Head Constable in the U. P. Police Force was appointed as officiating Platoon Commander in the combined cadre of Sub-inspector, Armed Police and Platoon Commander. He was subsequently reverted to the substantive post of Head Constable in 1968. At the time of reversion he was one among a group of about 200 officers most of whom were junior to him two questions arose, namely whether the order of reversion is attendant with any stigma and secondly whether there has been any discrimination violating Arts. 14 and 16 of the Constitution. It was held so far as reversion is concerned, the order of



reversion did not cast any stigma nor it has any evil consequences as the respondent neither lost his seniority in the substantive rank, nor there has been any forfeiture of his pay or allowances. It was also held that the order was liable to be quashed on the ground of contravention of Arts. 14 and 16 of the Constitution inasmuch as while the respondent had been reverted, his juniors were allowed to retain their present status as Sub-Inspector and they have not been reverted to the substantive post of Head Constable. It was further held that there was no administrative reason for this reversion, so the order was held bad.

27. The question whether the order terminating the service of a probationer made according to the terms of appointment can never amount to punishment in the facts and circumstances of the case was considered by a Bench of 7 Judges of this Court in the case of *Shamsher Singh v. State of Punjab*, (1975) 1 SCR 814. In that case the service of two Judicial Officers who were on probation were terminated by the Government of Punjab on the recommendation of the High Court under R. 7 (3) in Part D of the Punjab Civil Services (Judicial Branch) Rules 1951 as amended. The services of the probationers were terminated without saying anything more in the order of termination. This was challenged on the ground that though the order on the face of it did not attach any stigma, yet the attendant circumstances which led to

passing of the order if considered then the orders would amount to have been made by way of punishment violating Art 311 of the Constitution. It has been observed relying on the observation of this Court in *Parshotam Lal Dhingra v. Union of India*, (AIR 1958 SC 36) by A. N. Ray, C.J. as follows : —

“No abstract proposition can be laid down that where the services of a probationer are terminated without saying anything more in the order of termination than that the services are terminated it can never amount to a punishment in the facts and circumstances of the case. If a probationer is discharged on the ground of misconduct, or inefficiency or for similar reason without a proper enquiry and without his getting a reasonable opportunity of showing cause against his discharge it may in a given case amount to removal from service within the meaning of Art. 311 (2) of the Constitution.”

28. This decision was followed and relied upon in the case of *Anoop Jaiswal v. Govt. of India*, (1984) 2 SCR 453. In that case the appellant being selected for appointment in the I.P.S. was undergoing training as a probationer. On a particular day all the trainees arrived late at the place where P. T/unarmed combat practice was to be conducted, although prior intimation was sent to them in this regard. This delay was considered as an incident which called for an enquiry. The appellant was considered to be one of the





ring leaders who was responsible for the delay. Explanation was called for from all the probationers. The appellant in his explanation sincerely regretted the lapse while denying the charge of instigating others in reporting late. After receiving the explanations, all the probationers including the appellant were individually interviewed in order to ascertain the facts. On the explanation and interview, but without holding any proper enquiry the Director recommended to the Government of India that the appellant should be discharged from the service. The Government accordingly passed an order of discharge of the appellant on the ground of unsuitability for being a member of the I.P.S. This order was challenged in the Writ Petition. It has been held as follows : -

“Where the form of the order is merely a camouflage for an order of dismissal for misconduct it is always open to the Court before which the order is challenged to go behind the form and ascertain the true character of the order. If the Court holds that the order though in the form is merely a determination of employment is in reality a cloak for an order of punishment the Court would not be debarred, merely because of the form of the order, in giving effect to the rights conferred by law upon the employee.”

29. The order was held to be bad as it was made on the ground of misconduct without affording reasonable opportunity to the appellant to defend himself as provided under Art. 311 (2) of the Constitution.

30. In the case of *Nepal Singh v. State of U.P.* AIR 1985 SC 84 the service of appellant Nepal Singh, who was employed in temporary capacity as Sub Inspector of Police, was terminated by an order of Deputy Inspector General of Police, Bareilly Range and the order merely stated that the appellant's services were not required any more and were terminated with one month's pay in lieu of notice. This order was challenged on the ground that it amounted to punishment and since no opportunity of hearing, as provided in the Art. 311 (2) of the Constitution, was afforded, the impugned order was liable to be quashed and set aside. It transpired at the time of hearing that a disciplinary proceeding was initiated against the appellant on the ground that he contracted the second marriage during the lifetime of his first wife and this act was done without obtaining prior permission of the Government. This disciplinary proceeding, however, was not proceeded with. Thereafter the Superintendent of Police, Suahianpur drew up a list to the effect that he was a corrupt officer and he was not straightforward. The impugned order was made thereafter. It was held that where allegations of misconduct were levelled against a Government servant and it was a case where provisions of Art. 311 (2) of the Constitution should apply, it was not open to the competent authority to take the view that holding the enquiry contemplated by that clause would be a bother or a nuisance and that, therefore, it was entitled to avoid the mandate of that provision and resort to the guise of an ex facie innocuous termination order.



reversion did not cast any stigma nor it has any evil consequences as the respondent neither lost his seniority in the substantive rank, nor there has been any forfeiture of his pay or allowances. It was also held that the order was liable to be quashed on the ground of contravention of Arts. 14 and 16 of the Constitution inasmuch as while the respondent had been reverted, his juniors were allowed to retain their present status as Sub-Inspector and they have not been reverted to the substantive post of Head Constable. It was further held that there was no administrative reason for this reversion, so the order was held bad.

27. The question whether the order terminating the service of a probationer made according to the terms of appointment can never amount to punishment in the facts and circumstances of the case was considered by a Bench of 7 Judges of this Court in the case of *Shamsher Singh v. State of Punjab*, (1975) 1 SCR 814. In that case the service of two Judicial Officers who were on probation were terminated by the Government of Punjab on the recommendation of the High Court under R. 7 (3) in Part D of the Punjab Civil Services (Judicial Branch) Rules 1951 as amended. The services of the probationers were terminated without saying anything more in the order of termination. This was challenged on the ground that though the order on the face of it did not attach any stigma, yet the attendant circumstances which led to

passing of the order if considered then the orders would amount to have been made by way of punishment violating Art 311 of the Constitution. It has been observed relying on the observation of this Court in *Parshotam Lal Dhingra v. Union of India*, (AIR 1958 SC 36) by A. N. Ray, C.J. as follows :—

“No abstract proposition can be laid down that where the services of a probationer are terminated without saying anything more in the order of termination than that the services are terminated it can never amount to a punishment in the facts and circumstances of the case. If a probationer is discharged on the ground of misconduct, or inefficiency or for similar reason without a proper enquiry and without his getting a reasonable opportunity of showing cause against his discharge it may in a given case amount to removal from service within the meaning of Art. 311 (2) of the Constitution.”

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**A.P. Sen****Judge****Supreme Court of India**

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31. In the instant case as we have stated already herein before that though the impugned order was made under the camouflage or cloak of an order of termination simpliciter according to the terms of the employment, yet considering the attendant circumstances which are the basis of the said order of termination, there is no room of doubt in inferring that the order of termination had been made by way of punishment on the ground of misconduct and adverse entry in service record without affording any reasonable opportunity of hearing to the petitioner whose services are terminated and without complying with the mandatory procedure laid down in Art 311 (2) of the Constitution of India.

32. The position is now well-settled on a conspectus of the decisions referred to hereinbefore that the mere form of the order is not sufficient to hold that the order of termination was innocuous and the order of termination of the services of a probationer or of an ad hoc appointee is a termination simpliciter in accordance with the terms of the appointment without attaching any stigma to the employee concerned. It is the substance of the order i.e. the attending circumstances as well as the basis of the order that have to be taken into consideration. In other words, when an allegation is made by the employee assailing the order of termination as one based on misconduct, though couched in innocuous terms, it is incumbent on the Court to lift the veil and to see the real circumstances as the basis of foundation of the order complained of.

In other words, the Court, in such case, will lift the veil and will see whether the order was made on the ground of misconduct, inefficiency or not. In the instant case we have already referred to as well as quoted the relevant portions of the averments made on behalf of the State respondent in their several affidavits alleging serious misconduct against the petitioners and also the adverse entries in the service records of these petitioners, which were taken into consideration by the Departmental Selection Committee without giving them any opportunity of hearing and without following the procedure provided in Art. 311 (2) of the Constitution of India, while considering the fitness and suitability of the appellants for the purpose of regularising their services in accordance with the Government Circular made in October, 1980. Thus the impugned orders terminating the services of the appellants on the ground that "the posts are no longer required" are made by way of punishment.

33. It also appears on a consideration of the averments made in paragraphs 7 and 8 of the Additional Affidavit sworn by one of the appellants Swinder Singh on August 8, 1984, which has not been controverted at all by the respondents, that the respondent though terminated the services of the petitioners on the ground that "these posts are no longer required" have retained and regularised the services of ad hoc employees mentioned in paragraph 7 as well as ad hoc Surveyors who were recruited later in the said post of



Surveyors to the prejudice of the rights of the appellants, thereby violating the salutary principle of equality and non-arbitrariness and want of discrimination and as enshrined in Arts. 14 and 16 of the Constitution of India. It is pertinent to refer here to the decision rendered by this Court in Sughar Singh's case (AIR 1974 SC 423) where it had been held that the order of reversion reverting the respondent from his officiating appointment to the post of permanent Head Constable while retaining 200 other Head Constables who were junior to him in the officiating higher posts of Platoon Commanders was discriminatory and arbitrary being in contravention of the Arts. 14 and 16 of the Constitution.

34. Similar observations have been made in the case of Manager, Govt. Branch Press v. D. B. Belliappa, (1979) 2 SCR 458. It has been held that the protection of Arts. 14 and 16 of the Constitution will be available even to a temporary Government servant if he has been arbitrarily discriminated against and singled out for harsh treatment in preference to his juniors similarly circumstanced. In that case the service of Belliappa, a temporary Class IV employee was terminated without assigning any reason although in accordance with the conditions of his service, three other employees simi-

larly situated, junior to Belliappa in the said temporary cadre, were retained. The order of termination was held to be bad as it offended the equality clause in Arts. 14 and 16 of the Constitution.

35. In the instant case, ad hoc services of the appellants have been arbitrarily terminated as no longer required while the respondents have retained other Surveyors who are juniors to the appellants. Therefore, on this ground also, the impugned order of termination of the services of the appellants are illegal and bad being in contravention of the fundamental rights guaranteed under Arts 14 and 16 of the Constitution of India.

36. In the premises aforesaid, the impugned orders of termination of the services of the appellants are liable to be cancelled and set aside. Let appropriate writs of mandamus be issued directing the respondents, not to give effect to the impugned orders of termination of the services of the appellants. Let a writ of certiorari be issued quashing and cancelling the impugned orders of termination of services of the appellants and the appellants be deemed to be in service.

37. In the facts and circumstance of the case, the appeals are allowed with costs assessed at Rs. 2,002/-



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### OBSERVATION

**Constitution of India, Art. 311—Promotion to post of Agricultural Inspector—50% quota reserved in favour of clerical staff—Assurance given that final seniority list of clerical staff was prepared and promotion besides ad hoc promotion would be to regular post—Held, statement accorded full justice**

### OBSERVED BY

Mr. D. A. Desai and  
Mr. R. B. Misra  
Hon'ble Judges, Supreme Court of India

### IN

Special Leave Petns. Nos. 14169, 11928-29 of 1983 & 13549 of 1983 and 137 & 236 of 1984, 13689, 13662 and 14298-99 of 1983, decided on 20-1-1984 in the case of Sheo Dutt Sharma, Petitioner v. State of U.P. and others, Respondents.

And

Hari Ram and others etc., Petitioners v. State of U.P. and others, Respondents.

And

Jaismer Singh and another etc., Petitioners v. State of U.P. and others, Respondents.

And

Beldeo Prasad Chaturvedi, Petitioner v. State of U.P. and others, Respondents.

And

Anand Bihari Sharma, Petitioner v. State of U.P. and others, Respondents.

And

Vijay Prakash and others, Petitioners v. State of U.P. and others, Respondents.

### TEXT

Order :— Petitioners is this group of petitions were promotees to the cadre of Marketing Inspectors in the State of U.P. Way back on September 15, 1970, a decision appears to have been taken for recruitment to the cadre of Marketing Inspectors from two sources : (1) 50% of the posts to be filled in by promotion from the rank of clerical staff and (2) 50% by direct recruitment. For this purpose, it was decided to prepare a statewide seniority list of clerical

cadre, which would be the source from which promotion could be made to the cadre of Marketing Inspectors. The respondents used to make the promotions occasionally temporarily and occasionally ad hoc. It also appears that during the procurement season, the strength in the cadre of Marketing Inspectors is required to be augmented for the period of procurement. To Meet the need of temporary nature, ad hoc promotions used to be given, reversion



far as the posts of seasonal Marketing Inspectors are concerned which were created only for the period up to the end of August, 1983 we are not directing extension of the term of such posts. The persons who are to be accommodated within the 50 per cent promotion quota as directed above shall be accommodated to the extent possible against regular posts of Marketing Inspectors and not against seasonal posts. This order is being passed in supersession of earlier interim orders passed in this case."

6. Mr. Kapil Sibal stated that the State of U. P. accepts the finding herein recorded that the seniority list in respect of the clerical cadre dated January 10, 1983 would be treated as the final seniority list and promotion to the post of Marketing Inspector will be made according to the seniority as set out in the seniority list dated January 10, 1983. He made it clear that if any individual claims any error concerning himself in the seniority list on a proper representation being made the same will be examined and the conclusion reached would be given effect. He stated that the State of U. P. will act according to and consistent with the direction made by the Allahabad High Court as extracted hereinabove. He stated that he makes the aforementioned statement on behalf of the State of U. P.

7. The main relief was sought against the State of U. P. The State of U. P. accepts through Mr. Kapil Sibal that the seniority list of the clerical staff dated January 10, 1983 is the final seniority list and would be the basis on which promotion to the post of Marketing Inspector would be made according to the place in the seniority list to fill in 50% of the promotion quota subject to reservations in favour of Scheduled Castes and Backward Classes candidates according to the rules in force. The promotion would be to the regular post of Marketing Inspector. Ad hoc promotion may be made as per the seasonal requirement, more especially during the procurement season. However such promotions must be specific in terms with specification of the period during which promotion is given. Such promotions would be outside the quota of 50% to be filled-in by promotion in the regular cadre of Marketing Inspectors. Petitioners shall be abjusted with regard to their promotions as herein indicated. The statement by Mr. Kapil Sibal would accord full justice to the petitioners and they cannot claim any more relief in these petitions and therefore, petitions stand disposed of with no order as to costs.

Order accordingly.



following as a matter of course on the procurement season coming to an end. As large number of Marketing Inspectors were sought to be reverted, number of writ petitions were filed by the Marketing Inspectors who were under a threat of reversion in the Allahabad High Court. Some of them such as petitioners in Civil Misc. Writ No. 6763 of 1983 in the Allahabad High Court succeeded in obtaining interim relief from the vacation Judge and under the sanction of interim order continued to function as Marketing Inspectors. A Division Bench of the High Court finally disposed of the writ petition at the admission stage observing that the promotions of the petitioners in that case were ad hoc and up to and inclusive of the period August 31, 1983 and therefore, they had no right to the post of Marketing Inspector. The High Court further observed after referring to the counter-affidavit filed on behalf of the State of U.P. that the steps were being taken for preparation of statewise seniority list of clerical staff for the purpose of promotion to the post of Marketing Inspector. The High Court accordingly held that the petitioners have no right to be in the posts of Marketing Inspectors and accordingly dismissed the writ petition.

2. Number of other writ petitions involving the same point were dismissed observing that for the reasons recorded in the judgement in Writ Petition No. 6763 of 83, cognate petitions raising the same point may be dismissed.

3. Some other writ petitions filed by Marketing Inspectors claiming identical relief came up before another Division Bench of the same High Court. The Division Bench rejected the writ petitions observing that the petitioner have an alternative remedy for obtaining the same relief by approaching U.P. Public Services Tribunal and therefore, the writ petitions were liable to be dismissed.

4. The petitioners whose writ petitions were dismissed by the High Court for the aforementioned two reasons have filed these special leave petitions.

5. Today when these special leave petition came up for admission, Mr. Kapil Sibal, learned counsel who appeared for the State of U.P. drew our attention to an order made by a Division Bench of the Allahabad High Court on September 20, 1983 in writ Petition No. 3440 of 1983, the relevant portion of which may be extracted:

“We accordingly direct that so far as appointments on the posts of Marketing Inspectors by promotion from among the clerks are concerned, such of the officiating Marketing Inspectors as are senior most according to the said seniority list as corrected up to date and as could be accommodated within the 50 per cent promotion quota (subject to reservation against promotion posts, in favour of Scheduled Castes and Backward Classes Candidates) shall be allowed to continue as officiating Marketing Inspectors while the rest may be reverted. It is further clarified that so



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### OBSERVATION

**Disciplinary enquiry—Firmness—Vague charges—Enquiry vitiated—Omission to raise objection by delinquent as to vagueness of charges—Department not exonerated from establishing charges—Order of termination of service based on such charges, not sustainable. Spl. Appeal No. 74 of 1972D/7-4-1972 (Raj), Reversed—Constitution of India, Art. 311.**

### OBSERVED BY

Mr. E. S. Venkaramiah and Mr. Sabyasachi Mukharji  
Hon'ble Judges, Supreme Court of India.

### IN

Civil Appeal No. 2179 (N) of 1972, decided on 2-5-1986 in the case of Sawai Singh, Appellant v. State of Rajasthan, Respondent.

### TEXT

Sabyasachi Mukharji, J. : This is an appeal by special leave granted by this Court against the order dated 7th April, 1972 of the High Court of Judicature for Rajasthan, at Jodhpur, in Special Appeal No. 74 of 1972. The High Court of Rajasthan, Jodhpur in the said appeal refused to interfere with the order of the learned single Judge of that High Court. The learned single Judge had dismissed the writ petition of the appellant challenging the order of termination of his services.

2. The appellant was an employee of the Rajasthan Government and was appointed as returning officer to conduct Panchayat elections at Sardi in Panchayat Samiti Ladnun in the district of Nagaur held in the month of December, 1960. At that time, the appellant was working as Superinten-

dent, Sheep & Wool, Nagaur. The election was to take place on 26th December, 1960 and the date for submission of nomination forms was 25th December, 1960. Four persons, namely, Shri Chaturbhuj, Shri Purna Ram, Shri Jiwan Ram and Shri Jiwan Dass filed their nomination forms. The nomination paper filed by Shri Chaturbhuj was alleged to have been found incomplete and it was, therefore, rejected. The nomination paper was said to be defective for the following reasons—

(i) In the opening line the Ward Number was not filled in and the space provided therefore was left blank;

(ii) In the second line out of the words Panch/Sarpanch one of the two was not struck out; so that there was no indication whether the nomination was for the office of Panch or that of Sarpanch.



(iii) In the third line in the blank space again intended to specify the office, the said Chaturbhuj had filled in his own name thus instead of stating that he was proposing himself as candidate for the office of Panch or Sarpanch, it was found that he was proposing himself as Chaturbhuj.

(iv) At the end of sub-paragraph (1) containing a declaration by the candidate as to his qualifications the said Chaturbhuj did not strike off one of the two words Panch/Sarpanch.

3. In view of the above, the nomination paper was rejected. Shri Jiwan Dass and Shri Jiwan Ram withdrew their candidature and Shri Purna Ram was left alone in the field and was, therefore elected to the office of Sarpanch.

4. On the 2nd July, 1985, the Government of Rajasthan informed the appellant that an enquiry was proposed to be held against him on charge which was follows :

“That the said Shri Sawai Singh, while functioning as District Sheep & Wool Officer, Nagaur, during the year 1960 was appointed as Returning Officer to conduct Panchayat Election at Sardi in Panchayat Samiti Ladnun in the month of December, 1960. That the said Shri Sawai Singh showed undue favour to one of the contesting candidates Shri Purna Ram. He manipulated the withdrawal of Shri Jeevan Dass a dummy candidate of Shri Chaturbhuj who was contesting candidate against Shri Purna Ram. The said Shri Sawai Singh committed forgery by effecting erasion in the

word “panch” on the nomination paper of Shri Chatur Bhuj malafidely and improperly rejected his nomination form.”

5. The statement of allegations was also sent along with the forwarding letter and it was mentioned in the said statement as follows :

“4. Shri Sawai Singh manipulated the withdrawal of Shri Jeevan Dass a dummy candidate of Chaturbhuj by cheating.

5. He further committed forgery by effecting erasion in the word ‘panch’ on the nomination paper of Shri Chaturbhuj and malafidely and improperly rejected the nomination form of Chaturbhuj and thereby acted in furtherance of the prospects of the election of Shri Purna Ram as Sarpanch Sardi.”

6. A reply to the said charge-sheet was submitted by the appellant. He denied the charges levelled against him. By an order dated 4th November, 1965 the Government appointed the Additional Commissioner for departmental enquiry, Rajasthan, Jaipur as an Enquiry Officer to hold the enquiry against the appellant. The Enquiry Officer submitted his report on 27th March, 1967. Perusal of the enquiry report makes perfunctory reading comparing the evidence of Chaturbhuj and the appellant it is difficult to accept on what basis the enquiry officer accepted Chaturbhuj's version. The Enquiry Officer did not discuss the inherent improbabilities of the statements of Chaturbhuj which will be noted later.



7. On 3rd October, 1968, the government issued a show-cause notice to the appellant which was as follows:

“According to the report of the Enquiry Officer the charge has been proved to this extent that Shri Sawai Singh with dishonest intention to declare candidate Poornaram uncontested successful Sarpanch made changes in the nomination form of Shri Chaturbhuj which was complete at the time when it was presented and thus made it incomplete and thereafter illegally rejected it. The State Government has provisionally accepted the decision. The State Government has provisionally taken further decision that Shri Sawai Singh be removed from State Service for the said mistake. Hence Shri Sawai Singh is hereby given an opportunity that if he wants to file a representation against the provisional decision he may present it within 15 days from the date of receipt of this letter to the undersigned.”

8. It may be mentioned that what was the dishonest motive except the inference from the rejection of the nomination paper on alleged improper grounds nothing was indicated in the report of the Enquiry Officer.

9. This notice, however, was later on cancelled and a fresh show-cause notice was issued. The appellant gave an elaborate reply to the said notice. To complete the narration of events, the government by an order dated 5th April, 1971 accepted the findings of the Enquiry Officer and directed his removal from service. The appellant filed a writ peti-

tion before the High Court. The writ petition was heard by P. N. Singhal, J. as the learned judge than was of the High Court and he by his order dated 31st August, 1971 dismissed the same summarily.

10. The appellant filed a Special Appeal before the Division Bench. The said appeal was also summarily dismissed on 7th April, 1972. Thereafter on refusal of the High Court to grant a certificate, by special leave, this appeal has come up before us nearly 15 years after the termination of employment.

11. Shri Tapash Chandra Roy, learned advocate for the appellant, urged before us three main submissions, namely, (i) the charges were not clear, (ii) there was no evidence to support the charges and on the contrary (iii) the evidence on record was contrary to the charges made. The charges framed have been noted namely, (i) The appellant showed undue favour to one of the candidates Shri Purna Ram. (ii) He manipulated the withdrawal of Jiwan Dass, the dummy candidate of Shri Chaturbhuj who was the contesting candidate against Shri Purna Ram and (iii) Shri Sawai Singh committed forgery by effecting erasure of the word ‘panch’ on the nomination paper of Shri Chaturbhuj and mala fide rejected his nomination paper. The second charge i. e. the withdrawal of Jiwan Dass can only be understood in the light of the statement of Shri Jiwan Dass. Shri Jiwan Dass stated thus in his evidence which was on the record of the enquiry:



"I withdraw my nomination paper at 3P. M. I only heard in the evening that the nomination paper of Chaturbhuj had been rejected. I do not know whether symbol was issued to Chaturbhuj or not. My statement was recorded by Collector Ex. P. 11 and also by C. I. which is Ex. P. 12 I had withdrawn my nomination paper voluntarily. No one told me that nomination paper of Chaturbhuj had been accepted, and no that basis, I should withdraw my nomination paper. I do not remember whether I had stated in portion A to B of the statement marked Ex. P. 12 that I was told regarding the acceptance of the nomination form of Chaturbhuj For that reason I had withdrawn my nomination form. I was not present when Chaturbhuj had asked the reason for rejection of his nomination paper I do not remember whether I had given the statement marked C to D in Ex. P. 12 P. A. to (sic). The statement of Ex. P. 11 was taken by the steno of the Collector in the absence of Collector. The steno was drunk at that time. I cannot say what he recorded in my statement. I had not stated as marked A to B and C to D in Ex. P. 11. On cross-examination the Departmental Officer stated that my nomination form was filled by Sohan Singh. I was not dummy candidate".

12. A fair reading of the said statement would give a complete lie to the charge that the appellant manipulated the withdrawal Jiwan Dass. It is clear that the first charge was not clear, in the sense, how the appellant was alleged to have manipulated the withdrawal of Jiwan Dass. It is

difficult for any officer to meet a charge of this nature. The second charge was about committing forgery effecting erasure of the word 'panch' on the nomination paper of Shri Chaturbhuj. This allegation was sought to be proved by the evidence of handwriting expert. The hand-writing expert was not available for cross-examination on the ground that at that time he was dead. But if evidence of hand-writing expert was necessary to prove the guilt of the appellant then it was necessary on the part of the department to adduce evidence to call another hand-writing expert to corroborate their charge.

13. In order to prove the charge against him it was necessary to establish that Shri Chaturbhuj had filed nomination being Ex. P. 13 complete in all respects. Shri Chaturbhuj is the complainant and his evidence on filing of the nomination paper is not only contradictory but also leads one to believe that he had filed an incomplete nomination form. Shri Chaturbhuj in Ex. E. H. P. 1 (D. E.) stated that his nomination paper was duly filed in by him. This was taken by the Enquiry Officer to mean that the nomination paper was complete in all respects and wrongly rejected Shri Chaturbhuj on 8th July, 1966 was shown the nomination form Ex. P. 13 and he admitted that Ex. P. 13 bears his signatures and that he had submitted it for Sarpanch but he had struck off the word 'panch' in the nomination paper So as to convey his proposal for sarpanch. He also could not say on seeing the nomination



paper that the word 'panch' in the nomination paper marked A & B by the Additional Commissioner, Departmental Enquiry, had been struck off or not. He could not say whether any rubbing or erasure of the word 'panch' had taken place or not. Shri Chaturbhuj had stated that he did not. Shri Chaturbhuj had stated that he did not remember who had written his nomination paper. There were two persons present at the time. One was his brother Shri Dhar who was not produced in the Departmental Enquiry and the other was Puran Chand Sharma of Ladnun. This was an ambiguous and misleading statement. On the other hand, in the evidence of Shri Puran Chand, he said that he had filled up one form for Shri Chaturbhuj for Sarpanchship and identified the same to be Ex. P. 13. He stated after a look at Ex. P. 13 that the form was filled up by him in his own hand except the signatures which were done by Shri Chaturbhuj himself in his presence. When the form was shown to him, he stated in his examination-in-chief that the name of Shri Chaturbhuj in Ex. P. 13 marked G to H and J to was in the handwriting of Shri Chaturbhuj himself and also the signatures K to L were in the handwriting of Shri Chaturbhuj. There were several other contradictions in the said statement of Puran Chand which were mentioned in paragraphs 11 to 13 of the writ petition before the High Court. These were not considered by the High Court.

14. Quite apart from that fact, it appears to us that the charges were

vague and it was difficult to meet the charges fairly by any accused. Evidence adduced was perfunctory and did not at all bring home the guilt of the accused.

15. Shri B. D. Sharma, learned advocate for the respondent, contended that no allegations have been made before the enquiry officer or before the High Court, that the charges were vague. In fact the appellant had participated in the enquiry. That does not by itself exonerate the department to bring home the charges.

16. It has been observed by this Court in *Surath Chandra Chakravarty v. State of West Bengal* (1971) 3 SCR 1: (AIR 1971 SC 752) that charges involving consequences of termination of service must be specific, though a departmental enquiry is not like a criminal trial as was noted by this Court in the case of *State of Andhra Pradesh v. S. Sree Rama Rao* (1964) 3SCR 25: and as such there is not such rule that an offence is not established unless it is proved beyond doubt. But a departmental enquiry entailing consequences like loss of job which now-a-days means loss of livelihood, there must be fair play in action in respect of an order involving adverse or penal consequences against an employee, there must be investigation to the charges consistent with the requirement of the situation in accordance with the principles of natural justice in so far as these are applicable in a particular situation.

17. The application of those principles of natural justice must always be



in conformity with scheme of the Act and the subject matter of the case. It is not possible to lay down any rigid rules as to which principle of natural justice is to be applied. There is no such thing as technical natural justice. The requirements of natural justice depend upon the facts and circumstances of the case, the nature of the enquiry, the rules under which the Tribunal is acting, the subject matter to be dealt with and so on. Concept of fair play in action which is the basis of natural justice must depend upon the particular lie between the parties. See *K. L. Tripathi v. State Bank of India* (1984) 1 SCC 43) Rules and practices are constantly developing to ensure fairness in the making of decisions which affect people in their daily lives and livelihood. Without such fairness democratic governments cannot exist. Beyond all rules and procedures that is the *sine qua non*.

18. Having regard to the consequences with which the delinquent officer was charged and having regard to the nature of charge and the evidence of hand-writing expert and the absence of

opportunity for cross-examination and the conflicting nature of evidence of Chaturbhuj and nature of evidence given by Jiwan Dass we are of the opinion that the report of the enquiry officer finding the appellant guilty should not have been sustained and the government should not have acted upon it. The High Court, in our opinion, with great respect, was in error in not bearing in mind these aspects which have been indicated hereinbefore.

19. In that view of the matter the order of the High Court cannot be sustained. In the premises, the order and judgement of the High Court are set aside. The appeal is allowed. The appellant is entitled to the costs of this appeal. The appellant would also be entitled to his remuneration and salary for all this period. We do not know if during the pendency of this appeal the appellant has superannuated and retired. If that is so, he should be in service up to the date of superannuation with the entitlement of pensionary relief. If not, he should be re-instated.

Appeal allowed.



## OBSERVATION

**Constitution of India, Art. 136—Special leave petition—Distribution of sal seeds—Direction for, by High Court First part of direction held proper.**

## OBSERVED BY

Mr. A. P. Sen and  
 Mr. S. Natarajan  
 Hon'ble Judges, Supreme Court of India

## IN

Spl. Leave Petns. Nos. 14636, 15126-27, 15212-14, 15697 and 17314-15 of 1985 decided on 10-4-1986 in the case of M/S. K. N. Oil Industries etc., Petitioners v. Secretary to the Ministry of Forest, Bhopal and others, Respondents.

## With

State of M. P., Petitioner v. M/s. Sal Udyog (P) Ltd. and others, Respondents.

## TEXT

Order :—These Special Leave Petitions are directed against the judgement and order of the Madhya Pradesh High Court dated June 6, 1985 in regard to distribution of sal seeds. The operative part of the judgement of the High Court in paragraph 54 contains a direction to the effect :

“In the light of the discussion above, therefore, these petitions are disposed of with the direction that the allotment which has been maintained by this Court to the new units and the allotment made to the Mandala Unit at the rate of 10,000 tons per year, could not be altered at the concessional rate for 5 years from the beginning and the remaining sal seeds available every year could only be fairly distributed to all

the old units on the basis of their capacity and there appears to be no justification for any concessional rate to these units which could only be allotted the quantity available at the market rate as there is no justification for any concessional rate to the old units.”

2. It would be seen/that the first part of the direction keeps intact, the right of the new units viz. Messrs Bastar Oil Mills Industries Limited, Messrs Sal Udyog, Limited, Messrs Allied Oil Industries Limited and Messrs Madhya Pradesh Glychem to allotment of sal seeds to the extent of 10,000 tons per year at a concessional rate guaranteed in terms of the contracts entered into by them with the State Government of Madhya Pradesh. But there is obvious-



sly a mistake as to the Period of five years mentioned therein as we shall presently show.

3. The second part of the direction relates to the remaining sal seeds available every year and this, according to the High Court, could only be fairly distributed as between the old units viz. Messrs M. P. Oil Extraction Pvt. Ltd., Messrs K.N. Oil Industries and Messrs General Food Pvt. Ltd. on the basis of their capacity. As regards the distribution of the remaining sal seeds available every year, the High Court has held that there was no justification of any concessional rate of supply of these units which could only be allotted the quantity available at the market rate. There is some controversy as to the basis upon which distribution of sal seeds is to be made to these units i.e. whether upon the basis of their capacity or on the basis of their utilisation.

4. After hearing learned counsel for the parties at considerable length and having given the matter our anxious consideration, we are satisfied that the High Court was justified in making the first part of the direction as regards the guaranteed supply of 10,000 tons per year of sal seeds to the new units as per the terms of the contract entered into with them by the State Government, and there could be no alteration of the concessional rate as stipulated for in their contracts. The reason for this obvious. The appeals preferred by Messrs M. P. Oil Extraction Pvt. Ltd. and by Messrs K. N. Oil Industries being Civil Appeals Nos. 294-

95/81 having been withdrawn on January 5, 1984, the result was that the judgement of the High Court reported in AIR 1982 Madh. Pra 1, M. P. Oil Extraction Pvt. Ltd., Raipur v. State of Madhya Pradesh became final. No doubt, the said appeals were withdrawn by the petitioners because they had arrived at a settlement dated November 16, 1983 with the State Government. Admittedly, the aforementioned new units were not parties to the settlement, nor were their representatives present at the meeting held on June 20, 1983 when the terms of the settlement were reached. It is undisputed that the new units had no notice of the aforesaid meeting nor were they apprised that the State Government contemplated any change in the quantity of sal seeds to be supplied or as to the area of supply. The first part of the direction must therefore be upheld, subject to a modification as to the period mentioned therein.

5. There is an obvious error in the judgement of the High Court which has to be rectified. The High Court has throughout proceeded on a wrongful assumption that the new units under the terms of their contracts with the State Government were assured the supply of sal seeds at a concessional rate for a period of five years. This is plainly contrary to the terms of the contract as between the parties. Under Clause 6 of the contract, the State Government had undertaken to supply to them sal seeds at a concessional rate for a period of four years. It is clarified that the first part of the direction which relates to



the guaranteed supply of 10,000 tons per year to the new units at a concessional rate as stipulated in Clause 3 (1) of their contracts with the State Government would be limited to a period of four years. The direction made by the High Court is accordingly modified.

6. It is however urged on behalf of the new units that the term of four years stipulated for by clause 6 was impossible of compliance till this Court lifted the embargo by its order dated May 6, 1982 by directing that the stay orders operative till that date shall be kept in abeyance and that the contracts with the new units be implemented. It is submitted that because of this, supply of sal seeds to the new units could not be effected till the year 1982. This is controverted by learned counsel appearing on behalf of the State Government. We refrain from expressing any opinion on this aspect. The question whether the period of supply at a concessional rate for a period of four years has to be reckoned from the date of the contract as specified in clause 1 thereof or from the date of actual supply, may give rise to a dispute for which these units may take recourse to arbitration as provided for in clause 23 of the agreement.

7. We must then revert to the second part of the direction made by the High Court as to the distribution of the remaining sal seeds available every year i. e. the quantity of sal seeds remaining for distribution after the State Government had complied with its contractual obligations of making supply to the new

units at 10,000 tons per year. According to the High Court, the remaining quantity of sal seeds available every year could only be fairly distributed among the old units according to their capacity. There is no discussion in the judgement as to how the apportionment has to be made of remaining quantity of sal seeds among the old units. During the course of argument before us, conflicting claims were made as to the basis on which the allotment is to be made. According to learned counsel appearing for Messrs K. N. Oil Industries and Messrs M.P. Oil Extraction Pvt. Ltd. the basis of allotment should not be the capacity but utilisation. The contention to the contrary put forward by learned counsel appearing on behalf of Messrs General Food Pvt. Ltd. is that fair and equitable distribution necessarily implies that the basis of allotment should be according to capacity and not utilisation. He drew our attention to the fact that his clients for want of allotment were per force required to purchase huge quantities of sal seeds from the market at an exorbitant price.

8. We accordingly remit the matter to the High Court for a decision afresh limited to this aspect only i. e. as to the basis for distribution of the remaining quantity of sal seeds available per year as between the old units. The High Court shall reach a decision afresh on the question after affording opportunity to all the parties affected. The parties may amend their pleadings and place such additional material in



support of their respective claims as they may be advised.

disposed of accordingly. There shall be no order as to costs.

9. The Special Leave Petitions are

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Order accordingly.



### OBSERVATION

**Constitution of India, Arts. 39 (d), 14, 16—Veterinary Assistant Surgeons working in office of Development Commissioner; Delhi—Disparity between their pay scale and pay scale of similar persons in employment of Central Govt. and Union Territory of Chandigarh—Claim for equal pay—Claim though prima facie legitimate not dealt with by Court as 4th Pay Commission was to consider very same question.**

**(B) Constitution of India, Article 311—Government employees—Pay structure Fixation—Matters to be considered by Pay Commission.**

### OBSERVED BY

**Mr. E. S. Venkataramiah and**  
**D. P. Madon**  
**Hon'ble Judges, Supreme Court of India**

### IN

**Writ Petn. No. 9080 of 1983 decided on 12-5-1984 in the case of Delhi Veterinary Association, Petitioner v. Union of India and others, Respondents.**

### TEXT

**Order :—**The Delhi Veterinary Association is the petitioner in the above case. It is an association of veterinary doctors who are residing in the Union Territory of Delhi. By this petition under Article 32 of the Constitution, the petitioner is seeking relief in respect of Veterinary Assistant Surgeons working in the office of the Development Commissioner, Delhi Administration, Delhi, who are its members. It is alleged that these Veterinary Assistant Surgeons have been denied the benefit of the principle of 'equal pay for equal work' incorporated in Art. 39 (d) of the Constitution and that there has been violation of their fundamental rights guaranteed under Article 14 and Article 16 of the Constitution because their scale of salary is

lower than the pay scale of Veterinary Assistant Surgeons employed by the Union Territory of Chandigarh or by the Central Government in the Indo-Tibetan Border Police (I. T. B. P.) and in the Border Security Force (B. S. F.) It is also alleged that the Veterinary Assistant Surgeons are persons who have obtained Bachelor's Degree in Veterinary Science and Animal Husbandry (B. V. Sc. & A. H.) from colleges of Veterinary Medicine and the minimum qualifications for entering the said course are more or less the same as those prescribed for M. B. B. S. or B.D. S. Examinations. They would be taught in the colleges of veterinary medicine inter alia subjects like Biochemistry, Pharmacology and Toxicology, Bacteriology, Pathology,



Hygiene, Parasitology, Surgery, Radiology, Clinical & Preventive Medicine, Obstetric, Gynaecology and additionally Animal Husbandry. Some of them, it is stated, have also undergone some special courses after their degree. Having regard to the period of study in the college and the subjects taught they claim that they are almost equal to those who have obtained M. B.B.S. and B.D.S. Degrees.

2. It is alleged that whereas the Veterinary Assistant Surgeons in the Union Territory of Chandigarh were paid salary in the pay scale of Rs. 850-1700 on the basis of the pay scale prevailing in the adjoining State of Punjab and the Veterinary Assistant Surgeons in the Union Territories of Arunachal Pradesh and Mizoram were paid in the pay scale of Rs. 550-900, the Veterinary Assistant Surgeons of the Union Territory of Delhi were given pay in the pay scale of Rs. 425-750 from Jan. 1, 1973 and on a representation being made by them, their pay scale, was modified to Rs. 550-900 with effect from November 2, 1977 as was being paid in the Union Territories of Arunachal Pradesh and Mizoram with effect from Jan 1, 1973 even though the Ministry of Agriculture had recommended that their pay scale should be revised to Rs. 650-1200. The petitioner contends that even now the disparity between their pay scale and the pay scale of the Veterinary Assistant Surgeons of the Union Territory of Chandigarh and of I. T. B. P. and B. S. F. which is fixed at Rs. 650-1200 persists. On the basis of the

above allegations the petitioner prays that a direction should be issued to the respondents to treat the Veterinary Assistant Surgeons of the Delhi Administration at par with the Veterinary Assistant Surgeons of Chandigarh, I. T. B. P. and B. S. F.

3. A counter-affidavit is filed on behalf of the Union Government denying many of the allegations in the petition and in particular the recommendation said to have been made by the Ministry of Agriculture.

4. The Development Commissioner, Delhi has filed a counter-affidavit justifying the impugned pay scale and at the same time he has pleaded that this is a matter which should be allowed to be examined by the Fourth pay Commission. In view of the latter plea, we feel that it is not appropriate to deal with the merits of the claim of the Veterinary Assistant Surgeons of Delhi in the course of this order although we feel that prima facie their grievance appears to be a legitimate one. Since any alteration in their pay scale would involve modification of the pay scales of officers in the higher cadres in the same department and in the corresponding cadres in other departments, the work of re-fixation of the pay scale should not ordinarily be undertaken by the Court at this stage become the Fourth pay Commission is required to consider the very same question after taking into consideration all the relevant aspects.

5. In addition to the principle of 'equal pay for equal work' the pay



structure of the employees of the Government should reflect many other social values. Apart from being the dominant employer, the Government is also expected to be a model employer. It has therefore, to follow certain basic principles in fixing the pay scales of various posts and cadres in the Government service. The degree of skill, strain of work, experience involved, training required, responsibility undertaken, mental and physical requirements, disagreeableness of the task, hazard attendant on work and fatigue involved are, according to the Third Pay Commission, some of the relevant factors which should be taken into consideration in fixing pay scales. The method of recruitment, the level at which the initial recruitment is made in the hierarchy of service or cadre, minimum educational and technical qualifications prescribed for the post the nature of dealings with the public, avenues of promotion available and horizontal and vertical relativity with other jobs in the same service or outside are also relevant factors.

6. At the same time while fixing the pay scales, the paying capacity of the Government, the total financial burden which has to be borne by the general public, the disparity between the incomes of the Government employees and the incomes of those who are not in Government service and the net amount available for Government at the current taxation level, which appears to be very high when compared with other countries in the world, for developmental purposes after paying the salaries and allowances to the Government servants have also to be bo-

rne in mind. These are however, not exhaustive of the various matters which should be considered while fixing the pay scales. There may be many others including geographical considerations.

7. Above all, it should be noted that the work of a pay Commission does not really mean an increase of Rs. 100/- here or recommending an additional allowance of Rs. 50/- there. It does not also mean a mere reduction of the number of pay scales or an attempt at the reduction of the gap between the highest pay scale and the lowest pay scale. It is a big exercise in gearing up the national economy to secure the highest good to the millions of our countrymen. In an egalitarian society based on planned economy it is imperative that there should be an evolution and implementation of a scientific national policy of incomes, wages and prices would be applicable not merely to Government services but also to the other sectors of the national economy. As far as possible the needs of a family unit have to be borne in mind in fixing the wages scales. The 'needs' are not static. They include adequate nutrition, medical facilities, clothing, housing, education, cultural activities etc. Any provision made while fixing the pay scales for the development of a society of healthy and well educated children irrespective of the economic position of the parents is only an investment and not just an item of expenditure. In these days of galloping inflation, care should also be taken to see that what is fixed today as an adequate pay scale does not become inadequate within a short



period by providing an automatic mechanism for the modification of the pay scale.

7-A. The duties of a Pay Commission are really onerous. But we have no doubt that the Fourth Pay Commission will keep in view all the relevant considerations, some of which are referred to above, while dealing with the complex problem of determining the equitable pay scales for the vast number of employees of the Central Government and the Union Territories. We have also no doubt that the Fourth Pay Commission will not just be another Pay Commission as in the past but will lay down sound principles regarding the salary structure of the public service.

8. In the above situation, we do not feel called upon to decide in isolation the question of discrimination raised before us. This is a matter which should be left to be decided by the Government on the basis of the recommendation of the fourth Pay Commission.

9. It was, however, urged that since

the Fourth Pay Commission would not be making any recommendation in respect of the period between 1973 and the date on which the new pay scale to be fixed on the recommendation of the Fourth Pay Commission would come into force, the Court should consider whether the Veterinary Assistant Surgeons were entitled to any retrospective benefit in respect of the said past period. Having regard to the long delay in approaching this Court after the fixation of their pay scale earlier, we do not propose to grant any relief in respect of that period.

10. The petition is, therefore, dismissed. The petitioner is at liberty to make its representation before the Fourth Pay Commission to determine the pay scale of the Veterinary Assistant Surgeons of Delhi. We are sure that the Fourth Pay Commission which is presided over by a former Judge of this Court would consider their representation sympathetically.

Petition dismissed.



## OBSERVATION

**Appointment of those employees who have worked in leave vacancy—  
One who has worked earlier in leave vacancy has preferential right over another who worked later.**

## OBSERVED BY

Mr. V. Khalid and Mr. G. L. Oza  
Hon'ble Judges, Supreme Court of India

## IN

Civil Appeal No. 1284 of 1973, decided on 25.2.1987 in the case of (Smt.) Mary Oomen Appellant v. The Manager, M. G. M. High School, Kuruppampaddy, Kerala and others, Respondents.

## TEXT

Khalid, J.—This appeal by special leave is directed against the judgment dated 18.1.1973, passed by the High Court of Kerala in writ Appeal No. 45 of 1972.

2. This appeal involves the correct interpretation and the scope and affect of R. 51-A of Chapter XIV-A of the Kerala Education Rules. This Rule reads as follows :—

“51-A. Qualified teachers who are relieved as per Rule 49 or 52 or on account of termination of vacancies shall have preference for appointment to future vacancies in schools under the same Education Agency, provided they have not been appointed in permanent vacancies in schools under any other Educational Agency.”

The Rule gives a teacher, discharged for want of vacancy or relieved as per Rule 49 or 52, a right to reappointment when a future vacancy comes into existence. It is usual for managers of schools to appoint teachers to leave vacancies. Sometimes more than one teacher get so appointed when there are more than one vacancy. When such vacancies cease to exist by the permanent incumbent coming back, the temporary appointees go out. When thereafter a permanent vacancy arises, those who had temporary worked in leave vacancies get preference to be appointed to that vacancy. The question in this appeal is whether the Manager who has to appoint a teacher to a permanent vacancy has to go by the rule of “last come first go”, to use the usual industrial jargon, in reverse, or whether the Manager has a right to choose between the temporary teachers,



ignoring the principle usually accepted that a person who gets a right to a post by virtue of earlier appointment should not be ignored in preference to a person who gets such title later. Before dealing with this case it will be useful to take note of a Note to Rule 51-A which as follows :

“if there are more than one claimant under this rule the order of preference shall be according to the date of first appointment. If the date of first appointment is the same, then preference shall be decided with reference to age, the older being given the first preference. In making such appointment, due regard should be given to requirement of subject and to the instructions issued by the Director under sub-r. (4) R. 1 as far as High schools are concerned.”

This note gives the correct guideline based on justice and fair play.

3. Now, we will briefly state the facts. The appellant is a B. A. B.Ed. degree holder. She is fully qualified to be appointed as a teacher in any Government or aided school in the state of Kerala. She was appointed in a temporary vacancy in the school of the First respondent, from 13-1-1970 to 16-3-1970, in the academic year 1969-70. The appointment has to be approved by the District Educational Officer, the second respondent herein, which was duly done. Since the vacancy in which the petitioner was working ceased to exist, she went out of the job on 16-3-1970. A further vacancy arose on 22-8-1970 and it continued till 17-12-1970. She

worked in this vacancy also. She went out of service when this vacancy ceased. Respondent No. 4 is another teacher who worked in the same school in another leave vacancy, from 1-9-1970 to 26-11-1970. The appellant thus had a total service of six months and one day while the 4th respondent had 2 months and 25 days of service, under the 1st respondent.

4. A permanent vacancy arose in the school for the academic year 1971-72, for Social Studies when the Head Master in that school retired. The appellant made a representation to the Manager for being appointed against that vacancy. The 1st respondent appointed the 4th respondent. The appellant is a Social Studies teacher. Thereupon complained to the second respondent. The second respondent found the appointment of the 4th respondent irregular and held that legitimate claimant for the permanent post was the appellant. On this finding he did not approve the appointment of the 4th respondent. The management took the matter in appeal before the Regional Deputy Director of public Instruction, respondent No. 3, who by his order dated 9-11-1971, allowed the appeal. Aggrieved by this order the appellant moved the High Court of Kerala by filing original petition No. 5064 of 1971, challenging the validity of the order passed by the 3rd respondent, inter alia, contending that as per R 51-A of chapter XIV (A) of the Kerala Education Rules, she had a preferential claim and that appointment of the 4th



respondent was illegal.

5. The learned single Judge dismissed the original petition by his Judgment dated 1-2-1972, on the short ground that R. 51A conferred a right on the appellant for appointment in the future vacancies in the school and it did not restrict the right of the management to make his own choice among the thrown out teachers. The appellant pursued the matter by filing Writ Appeal 45 of 1972. The Division Bench dismissed the appeal agreeing with the learned single Judge that the management had a discretion to choose among the thrown out teachers. Hence this appeal by special leave.

6. Though long years have passed by since this dispute arose wherefore we would have normally declined interference with the judgement under appeal, we think it necessary to lay down the law correctly to avoid injustice in cases like this and to prevent abuse of power by those in whom right is conferred under R. 51A. Now, both the appellant and 4th respondent are working in the same school. Though the subject to be taught by the appellant and the 4th respondent figured at one stage as an additional plea before the learned single Judge, it is inconsequential for this judgement, though the learned single Judge held in favour of the appellant on the question of the subject.

7. Let us read the rule in question. This rule speaks of qualified teachers. Both the appellant and the 4th respondent satisfy this requirement. It speaks of

teachers being relieved as per R. 49 or R. 52 or on account of termination of vacancies R 49 speaks of termination of teachers after vacation, when the vacancy in which they work extend over summer vacation and R. 52 speaks of teachers relieved on account of reduction in the number of posts under orders of the department. We are not concerned With these rules. Here, both the teachers were relieved on account of termination of vacancies. The Rule states, that such teachers shall have preference for appointment to future vacancies in schools under the same Educational Agency. A future vacancy has arisen. The school where appointment is sought is under the same Educational Agency. The proviso is not material in this case. All the conditions for application of this Rule are satisfied. The only question that has to be answered is whether a teacher who had worked in a vacancy earlier has a preferential right over a teacher who worked later in the same school. It is true that the rule does not, in terms, mandate that the one who worked earlier should be preferred to the one who worked later. But would it be in accord with justice and fair play, to prefer the who worked later to the one who worked earlier in the absence of anything in the Rule giving to the management a right to choose between the two, on the ground of suitability merit or efficiency. The judgement of the Division Bench under appeal was delivered on 18-1-1973. The note quoted above was inserted on 4-7-1972. The note leaves no doubt as to how Rule 51-A has to be construed. The Rule



states that preference will be given with reference to the date of appointment if the same, age should prevail the elder that due regards should be given to the requirements of subject as far as High Schools are concerned. The Division Bench did not choose to accept the clarification contained in the note. The Learned Judges held against the appellant, on the wording of the Rule that, in terms, it did not provide for any preference between two or more persons and did not consider it Proper to read more into this Rule by considering the Note to R. 5 in the same chapter. Although we do not say that a Note to a Rule has any binding effect, it does indeed have a persuasive force. It cannot be ignored that this Note has come as an appendage to Rs. 51-A for clarificatory purposes though it does not form a part of the Rule. The learned Judges felt that propriety and fairness required a decision in favour of the appellant, when they observed: "It would be proper no doubt to give an earlier appointee preference. But seeing the rule as we ought to see every rule and every section in the Kerala Education Rules and the Kerala Education Act as restrictions or regulations in the matter of the free right of the manager to choose and appoint, it is impossible to read more into the rule."

8. With respect, we feel that the learned Judges were influenced more by the words in the abstract contained in the rule and not with the fairness behind the rule.

9. The learned Judges of the Division Bench had before them another Division Bench Judgement where the identical rule fell for consideration. The relevant portion of that judgement was extracted by the learned Judges. We also find it useful to extract it here :

"5. Very recently, in writ Appeal No. 44 of 1970, we had occasion to construe R. 51-A. And we then observed that despite its unhappy wording, in particular, the use of the words, "preference for appointment" to mean "right to appointment", we had little doubt that what the rule meant was that a person discharged for want of vacancy had a right to be appointed in future vacancies, provided, of course, he had not by word or deed given up that right or, we might now and, disqualified himself meanwhile. And we added that the present tense of the words, "are relieved" appearing in the rule was the present tense of logic, not of time, so that, in effect, the rule should be read as if it said "qualified teachers who stand relieved" shall have preference. In that view, it is, no doubt, true that the petitioner's appointments between 1957 and 1961 furnished her with a title to reappointment notwithstanding that they were made before the rule came into force, and it is at least arguable that where no priority in preference is prescribed by the rule, priority should be determined by priority of title. The question, then, is whether the plea of abandonment taken by the 3rd respondent is well founded."



The above observation was got over by the Division Bench with the observation that "it was obiter and are certainly not intended to be conclusive observations in the matter. If so, we would have referred this case to a Full Bench." We would have been happy if the appellate Bench had referred this question to a Full Bench and resolved the controversy since the High Court felt that the appellant's contention carried with it the element of fair play and justice and was at least, to put it mildly, in some measure supported by another Division Bench of the same Court. We agree that the preference in R. 51-A should be based on priority of title. In this case, we do not have a plea of abandonment or other disqualification.

10. The learned counsel for the appellant brought to our notice how this Rule was understood by the Manager of the same school when another vacancy arose earlier. At that time also the present appellant applied to the Manager, seeking appointment in the vacancy consequent on the retirement of a Head Master. The Manager declined the request and sent a reply to the appellant, the relevant portion of which, eloquent in favour of the appellant, reads as follows :

"Rule 51-A, Chapter XIV-A, K.E. R. lays down that qualified teachers who are relieved on account of termination of vacancies shall have preference

for appointments to future vacancies. When two persons apply for a post by virtue of the concession laid down in R. 51-A, it is the natural justice to select the persons who has earlier and longer period of previous service. Hence considering all the aspects of the question, the management has appointed Smt. P.E. Sosamma in the said vacancy."

11. The Manager then understood the rule correctly, but later incorrectly. That is why we said earlier in our judgment that the interpretation given by the High Court to this Rule can result in abuse of this discretionary power with the Manager. If the Government wanted to clothe Manager the power to choose among rival cotenders to a future vacancy, the rule should be suitably amended. The rule as it stands clearly confers priority to the earlier appointee. The appellant, therefore, is entitled to succeed. We set aside the order of the Division Bench under appeal and allow this appeal. The appellant will be entitled to all the benefits as though she was appointed when the vacancy in question arose. We would like to make it clear that this dictation of ours will not enable her to draw salary for the period she had not worked but only other benefits such as seniority, increments, etc. The first respondent will pay costs of the appellant.

Appeal allowed.



IT IS THE ESSENCE OF DEMOCRACY  
TO OBEY  
NO MASTER BUT THE LAW



## OBSERVATION

(A) **Condonation of break in service**—Services of temporary teacher in Kendriya Vidyalaya terminated—Fresh appointment given but expressly without benefit of past service—Teacher's performance in subsequent years highly praised Held, he was entitled to benefit of continuous service notwithstanding term to the contrary in his fresh appointment—Constitution of India, Art. 311.

(B) **Appointment on temporary post**—Graduate teacher in Kendriya Vidyalaya Sangathan—Termination of service after three years—Petitioner represented to authorities requesting condonation of break in service—Commissioner of Sangathan, communicated that question of condonation could be considered after 3 years—Writ Petition challenging break in service filed after Govt. rejected his request for condonation of break—Petition does not suffer from laches—Constitution of India, Art. 226.

## OBSERVED BY

Mr. R. S. Pathak, Mr. R. B. Misra  
 Aad Mr. G. L. Oza  
 Hon'ble Judges, Supreme Court of India

## IN

Civil appeal No. 1760 of 1986, decided on 6-5-1986 in the case of Sushil Kumar Yadunath Jha, Appellant v. Union of India and another, Respondents.

## TEXT

Pathak, J.:— This appeal is directed against the order dated January 24, 1985 of the High Court of Delhi dismissing the appellant's writ petition on the ground of laches.

2. Having regard to the circumstances in which the writ petition was filed at the time when it was, the High Court, in our opinion, should have ignored the delay, and considered the matter on its merits.

3. The appellant was appointed on June 29, 1965 to the post of Post-Gra-

duate Teacher in Hindi in a Central Schools Unit under the Ministry of Education, Government of India. The Central Schools Unit was converted into an autonomous body under the Ministry of Education and was described now as the Kendriya Vidyalaya Sangathan. The appellant was appointed on probation for a period of one year. It was stipulated that even after the probation was satisfactorily completed the services of the appellant could be terminated at any time without any reason being assigned on the month's notice



or one month's pay and allowances in lieu of notice. Although the appointment was to a temporary post, it was mentioned specifically that the Schools were of a permanent nature and therefore, it was unlikely that the employee's services would be terminated if his work and conduct was satisfactory. The appellant appears to have done well during the period of probation and his services were continued after the expiry of that period on June 29, 1966. He continued in that post for about three years. During that period he was posted at the Central School No. 2, Holiday Camp, Colaba, Bombay. Thereafter he was sent to raise another School, the Kendriya Vidyalaya Vallabh Vidhya Nagar, Sardar Patel University, Anand (Gujarat). Subsequently he was posted at the Kendriya Vidyalaya, Lonavala. According to the appellant, his work was greatly appreciated at each of his postings and he earned two increments during that period. On February 29, 1968, however his appointment was terminated suddenly. The appellant made a representation against the termination of his services on March 8, 1968 and a few days later he was informed that an appointment letter was following. A fresh appointment with effect from June 24, 1968 was made and the appellant was specifically intimated that no benefit of the previous service rendered by him in the Kendriya Vidyalaya Sangathan would be admissible. The appellant was posted to the Kendriya Vidyalaya, Tambaram, Madras and thereafter to the Kendriya Vidyalaya, Srinagar.

The appellant seems to have been rather distraught about the break in service between March 3, 1968, when his services were actually terminated and June 24, 1968 when he entered upon his fresh appointment and requested the authorities that the break in service be condoned. The request was turned down and it was intimated that his personal behaviour during his early stint of appointment was found open to objection. The appellant, however, earned goodwill and high praise during subsequent years for the conscientious and dedicated work consistently put in by him. Successive and repeated communications were sent by his immediate superiors to the authorities detailing the high order of achievement shown by the appellant in his work and pressing that a lenient view be taken in regard to condoning the break in his service. He had been informed by the then Commissioner of the Kendriya Vidyalaya Sangathan that on the completion of three years of service his case could be reconsidered for condoning the break in service. In the hope that the assurance would be honoured the appellant persistently requested that the continuity of his service may be maintained. The record before us sufficiently establishes that his work was marked by outstanding efficiency and devotion and that almost everywhere that he was posted he was not found lacking in dedication to his responsibilities. During his posting in the Kendriya Vidyalaya Central School in Kabul, the Indian Ambassador, it appears was so impressed by his work that in February 1983 he examined his case and found that the



earlier termination of service had proceeded out of some personal misunderstanding, and that there was every reason for removing the break in service. The Government, however, expressed its helplessness in accepting the request on the ground that the existing Rules did not permit it. It was thereafter that the appellant, after obtaining permission to institute proceedings, filed a writ petition in the High Court.

4. It is apparent that the appellant made detailed representations from one level to another hoping that on the strength of his record the authorities would accede to his request for condoning the break in his service. There is equally no doubt that he was supported throughout by his immediate superiors because of the high order of the work preformed by him in his various postings. It was only when the Government itself turned down his request that he considered it proper to turn to a Court of law for redress. Upon the peculiar facts of this case we find it difficult to hold that the appellant was guilty of laches in restoring to the judicial process for relief. We think the High Court erred in rejecting the writ petition on that ground.

5. We have examined the record before us and have heard learned counsel for the parties. We do think that the respondents should have found it possible to accede to the request of the appellant for condoning the break in his service. There is no doubt that his services were terminated, but the grounds on which they are said to have been ter-

minated have subsequently not been found to be such as to constitute a permanent deterrent to a favourable consideration of the appellant's case. Indeed the Commissioner, as we have noted earlier, had expressed the view that it was a good case for condoning the break in service and indeed those who had occasion to personally witness the quality of the appellant's performance in subsequent years, as for example the Indian Ambassador at Kabul, had thought that in fairness and justice to the appellant his request should be accepted. It is true that his terms on which he was appointed afresh expressly stated that he would not be entitled to continuity of service, but we must have regard to the circumstances in which he accepted those terms. He was in no position to bargain for a better deal and in the straitened circumstances in which he found himself he was compelled to accept whatever was dictated to him. We do not for a moment suggest that the sanctity of the contract between the parties should be given a go-bye, but what we do find is that here is a case where the subsequent conduct and the quality of his performance, of which high appreciation was recorded by his superiors, indicated that he should be relieved of the disadvantage suffered by him pursuant to that term in his contract of fresh appointment. Having regard to the interests of justice and in all the circumstances of this case we are of opinion that the appellant is entitled to an order condoning the break in his service and holding that he should be considered as continuing in service throughout from the date of his original



appointment. We order accordingly.

6. The appellant will be entitled to all the benefits flowing from such continuity of service. It has not been shown in the counter-affidavit filed by the respondents that the seniority of any other teacher will be affected by allowing him consequential benefits. In the circumstances we see no reason to abridge the scope of those consequential benefits.

7. The appeal is allowed, the order dated January 24, 1985 or the High

Court is set aside and the respondents are directed to condone the break in service of the appellant and treat him as in continuous service from June 29, 1965 with all consequential financial and other benefits. The respondents are also directed to pay to the appellant the amount representing such financial benefits for the period ending April 30, 1986 within three months from today. In the circumstances of the case there is no order as to costs.

Appeal allowed.

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### OBSERVATION

**Seniority—Lecturer in college—Appointment on teaching assignment to foreign university—Extraordinary leave granted to him for foreign assignment would not affect break in service so as to deprive him of his seniority in college—U.P. State Universities (President's Act 10 of 1973), sec. 50 (1).**

### OBSERVED BY

Mr. A.P. Sen and S. Natarajan  
 Hon'ble Judges, Supreme Court of India.

### IN

Civil Appeal No. 1477 of 1986, decided on 2-5-1986 in the case of Dr. K.P. Hajela, Appellant v. N. S. Verma and others, Respondents.

### TEXT

Natarajan, J.—This appeal by special leave is directed against the order of a learned single Judge of the Allahabad High Court in Civil Misc. Writ Petn. No. 3710 of 1985 filed in the High Court by the first respondent herein. The appeal lies within a narrow compass as the limited question for consideration is whether the extraordinary leave granted to the appellant for the period 24-12-1980 to 31-7-1983 on the request of the Government of India for his being posted on a teaching assignment in the University of Aden (South Yemen) effected a break in service so as to deprive the appellant of his seniority in the Department of Zoology in the D.A.V. College, Kanpur.

2. The facts, which are not in controversy, of the case, are briefly as set out below.

On 1-9-1949 the appellant was appointed as Lecturer in Zoology in substantive capacity in the D.A.V. College, Kanpur. About six weeks later i.e. on 12-9-1949 (sic) the first respondent was also appointed as a Lecturer in Zoology in the same College. In the year 1974 the appellant was appointed as the Head of the Department of Zoology in the said College. On 24-12-1980 the appellant was granted extraordinary leave on the request of the Government of India for being sent on a teaching assignment to the University of Aden (South Yemen) on the express condition that his lien on the post in the College will be maintained and his seniority will be protected. On the basis of such an arrangement the appellant fulfilled his teaching assignment at the University of Aden and on return to India he sought to resume his post in the College.



The first respondent who was acting as the Head of the Department refused to hand over charge on the ground he had attained seniority over the appellant. It is relevant to mention here that the first respondent did not also continuously serve the College but left its services and went to other teaching institutions and after stints of service therein, he rejoined the Department of Zoology in the D.A.V. College, Kanpur. It would appear that the first respondent went over on 21-1-78 as Principal of the D.A.V. College, Dehra Dun and thereafter he went over as principal of the D.B.S. College, Kanpur and subsequently he came back to the D.A.V. College, Kanpur.

3. As the first respondent refused to hand over charge of the Department, the appellant made a representation to the principal and sought his intervention. After considerable delay the Principal refused to countenance the appellant's claim to seniority and sustained the stand taken by the first respondent.

4. The appellant challenged the order of the principal before the Vice-Chancellor of Kanpur University. While contending that he had not suffered a break in service and his seniority over the first respondent has remained intact all through his period of service on deputation, the appellant further contended that the first respondent had in fact suffered a break in service because of his spells of service at the D.A.V. College, Dehra Dun and the D.B.S. College,

Kanpur and as such the first respondent's claim of continuous service was an untenable one. The Vice-Chancellor upheld the appellant's claim that he had not suffered any break in service and by virtue of his lien he was entitled to his rightful place of seniority. Aggrieved by the order of the Vice-Chancellor, the first respondent preferred an appeal to the Chancellor but the Chancellor affirmed the order of the Vice-Chancellor and dismissed the appeal.

5. Thereafter the first respondent filed Civil Misc. Writ Petition No. 3710 of 1985 under Art. 226 of the Constitution before the High Court of Allahabad. By the impugned order a learned single Judge of the High Court allowed the writ petition holding that in terms of either the Old Statutes or the First Statutes of the Kanpur University the appellant herein is not entitled to reckon the period of service at the University of Aden for computing the length of service in the D.A.V. College and as such the recognition of the seniority of the appellant over the first respondent by the Vice-Chancellor and the Chancellor in their respective orders cannot be sustained. Accordingly the learned Judge has issued a rule in favour of the first respondent and it is against that order this appeal by special leave has been filed.

6. While presenting the case of the appellant before us Shri S.N. Kacker, learned counsel did not press the alternative contention of the appellant that the first respondent had suffered a break in service in the D.A.V. College Kanpur



and as such he has no locus to claim seniority. Consequently, the only ground on which the order of the High Court was assailed is that the High Court was in error in holding that the deputation service of the appellant has effected a break of service and as such he has lost his original seniority in the Department of Zoology. As the High Court has held that neither under the Old Statutes nor under the First Statutes of the Kanpur University the appellant is entitled to tack on his service in the University of Aden with his service in the D.A.V. College, Kanpur it is necessary to advert to the relevant provisions in the two Statutes. However, before such advertence, it will be relevant to refer to the letter of consent issued to the appellant by the then Principal viz. Shri S.C. Srivastava of the D. A. V. College, Kanpur as a condition precedent for his accepting the teaching assignment abroad. The letter, addressed to the Ministry of Home Affairs, is worded as under :—

“From

Principal  
D. A. V. College,  
Kanpur, U. P.  
India.

To,

Ministry of Home Affairs,  
Department of Personnel and  
Administrative Reforms,  
(Foreign Assignment Section)  
New Delhi

Assignment of Indian Experts abroad.

Certified that the appellant Dr. K.P. Hajela, Head of Zoology Department,

D. A. V. College, Kanpur, will be relieved for service abroad on foreign service terms in public interest (i. e. retaining the applicant's lien and protecting his seniority within thirty days of selection if need be). It is further stated that the applicant, Dr. Hajela, can be released for service abroad for a total period of three years.

August 21, 1978.

sd/- S. C. Srivastava”

It may be seen from this letter that the appellant had been granted leave for a period of three years and a specific undertaking had been given on behalf of the College that the appellant's lien in the College will be retained and his seniority also will be protected during his period of service abroad. It will also be relevant to mention in this context itself that even now the present Principal, who has declined to uphold the seniority of the appellant, has conceded in this order dated September 1, 1983 that the appellant's lien has been maintained. The relevant portion in the order is contained in para 6 and reads as under :

“Dr. Hajela's lien has been maintained on his post here in so far as the was granted extraordinary leave without pay for the period of contract service abroad and that no appointment was made in his place Other claims are not admissible.”

7. No doubt the first respondent and the present Principal of the College have taken the stand that the former Principal had no authority to guarantee



the appellant his lien in the Department and his rank of seniority. The merit of this stand will be gone into later but for the moment we would only like to point out that one part of the undertaking given by the former Principal namely, retention of lien has been conformed to and what is disputed is only the guarantee regarding the protection of seniority.

8. Now coming to the Statutes the relevant one in the old Statutes is 11.34 and the one in the First Statutes is 18.10. They are in the following terms :—

**Old Statues :**

**“Seniority of Teachers in Affiliated Colleges :**

11.34 (1) Subject to the provisions of these Statutes the seniority of teachers in a particular college shall be determined by the length of service in that College in the length of service in that College in the same cadre and in the same grade.

(2) The periods of service in another University or associated/affiliated college in the same or higher cadre and grade shall also count towards seniority if the University or College is situated in Uttar Pradesh and the College is affiliated to or associated with one of the Universities in the State.

(3) Service in an officiating capacity shall not be counted. Temporary service shall be counted only if it is in

continuation of a subsequent permanent appointment.

(4) The period of leave without pay shall not be counted in calculating the seniority unless during such leave another position involving similar work was held or it was medical leave”.

**First Statutes :**

**“Seniority of Principals and Teachers of affiliated colleges.**

18.10 The following rules shall be followed in determining the seniority of Principals and other teachers of affiliated colleges :

(a) the Principal shall be deemed senior to other teachers in the College ;

(b) the Principal of a post-graduate college shall be deemed senior to the Principal of a Degree College ;

(c) the seniority of Principals and teachers of the affiliated colleges shall be determined by the length of continuous service from the date of appointment in substantive capacity ;

(d) service in each capacity (for example, as Principal or as a teacher), shall be counted from the date of taking charge pursuant to substantive appointment ;

(e) Service in a substantive capacity in another University or another degree or post-graduate college whether affiliated to or associated with the University or another University established



by law shall be added to his length of service."

Another provision, which has not been adverted to by the High Court, is also set out, as it has relevance:

"18.16 (or 18.01-Ed): The statutes contained in this Chapter shall not affect the inter (se?) seniority of teachers employed in this University from before the commencement of these statutes."

9. In order to give operative force to the First Statutes over the Old Statutes in the event of any conflict in the provisions of the two Statutes a specific provision has been made in Chapter I Section 50 (1) / 102 (1) and it is worded as under:—

"All existing Statutes and all such Ordinances in force in the University, as are inconsistent with these Statutes are to the extent of such inconsistency, hereby rescinded and shall forthwith cease to have effect except as respects things done or omitted to be done before the commencement of these Statutes"

10. The High Court has taken the view that there is no inconsistency between Statute 11.34 of the Old Statutes and Statute 18-10 of the First Statutes and as such the seniority of the appellant should be determined in accordance with Statute 11.34 (2). As it is provided in sub-clause (2) of Statute 11.34 that the periods of service in another University or College is situated in Uttar Pradesh and the College is affiliated to or associated with one of the Universi-

ties in the State, it has been held that the appellant cannot tack the period of his service in the University of Aden with his service in the D.A.V. College for purposes of seniority. The High Court has further held that even if the First Statutes are held applicable the appellant will fare no better because under Sub-clause (e) of Statute 18.10 it is only the service rendered in a substantive capacity in another University or affiliated or associated College in the University or another University established by law that would count. As the University of Aden would not fall within the definition of "University or another University established by law" envisaged in the sub-clause the High Court has stated that any service rendered in a foreign University has to be necessarily excluded while computing the length of continuous service.

11. On a careful consideration of the matter we find that the High Court has not properly comprehended the Statutes. Taking up Statute 11.34 of the Old Statutes it may be seen that sub-clause (1) deals with the reckoning of seniority on the basis of the length of service in one and the same College and in the same cadre and grade; sub-clause (2) provides for the addition of service in another University or associated/affiliated College etc. provided the University is situate in Uttar Pradesh and the College is affiliated to or associated with one of the Universities in the State; sub-clause (3) excludes service in an officiating capacity and grants recognition of temporary service only if it has continu-



ity with a subsequent permanent appointment; and lastly sub-clause (4) prescribes for taking on of leave period with the total length of service provided; (1) the period of leave has been spent in holding another position involving similar work or (2) it was medical leave. Admittedly, the case of the appellant would not fall under sub-clause (2) because his service in the University of Aden will not constitute such kinds of services as are envisaged in the sub-clause. However, sub-clause (4) would undoubtedly, cover the case of the appellant because he had been granted leave of absence on loss of pay for a period of three years for rendering service in the University of Aden on deputation basis. The words "unless during such leave another position involving similar work was held" would squarely apply to the period of leave of the appellant. It is significant to note that the qualifying words "University or College situated in Uttar Pradesh and the colleges affiliated to or associated with one of the Universities in the State" occurring in sub-clause (2) are conspicuously absent in sub-clause (4). It is not the case of the first respondent and for that matter there can be no such contention also that the position held by the appellant in the University of Aden did not involve the performance of work similar to the one he was performing in the D.A.V. College, Kanpur. Unfortunately, this sub-clause which is the one directly governing the case of the appellant has not been noticed by the High

Court. As there is no conflict between sub-clause (4) of statute 11.34 of the Old Statutes and any provision in the First Statutes there is no room or scope for invoking the overriding provision contained in Statute 1.02 (1) for denying the application of Old Statute 11.34 (4) to the case of the appellant. On the other hand the appellant will be entitled to claim the benefit of First Statute 18.16 (or 1801-Ed.) which preserves "inter (se?) seniority of teachers employed in the University from before the commencement of the Statutes."

12. The High Court has failed to notice that sub-clause (2) and (4) of Old Statute 11.34 contemplate different situations and act in different fields. The service contemplated under sub-cl. (2) is a distinctly different service and has no bearing with the service rendered in the particular institution in which seniority is claimed. Even so, a link is provided between the services rendered elsewhere and the services rendered in the concerned University or College because of the similarity of features in the two services and the integral connection between the Universities situated in the State and the affiliation or association of the Colleges with one or the other of the Universities in the State. On the other hand the service contemplated under sub-clause (4) is the service rendered elsewhere during leave period even while the teacher continues to be on the rolls of the institution in which he has been rendering service. Thus while sub-clause (4) contemplates



service rendered elsewhere during the period of leave, sub-clause (2) does not contemplate any such service but contemplates the service rendered elsewhere without taking leave from any institution. A proper exposition of the fields of operation of sub-clauses (2) and (4) of Old Statute 11.34 will at once bring to light the merit in the contentions of the appellant and the error that has been committed by the High Court. As we have already stated the provision contained in sub-clause (4) of Old Statute 11.34 has not been disturbed in any manner by the First Statutes and hence the appellant will be entitled to the benefit of this provision, especially in terms of Statute 18.16 of the First Statutes. Because of the failure of the High Court to have applied the appropriate provision in the Statutes, the period of service of the appellant on deputation has been wrongly held to be non-includible in the total length of service of the appellant and this has led to the denial of the appellant's rightful seniority.

13. As the appellant's case falls squarely within Old Statute 11.34 (4) there is no need or necessity for resorting to the provisions of the First Statutes for determining the appellant's claim of seniority. It is not the case of the appellant that he had rendered service in a substantive capacity in another University or another affiliated or associated College established by law as contemplated by sub-cl (e) of First Statute 18.10. On the other hand his claim is that he had all along continued

to be in the service of the D.A.V. College, Kanpur notwithstanding his service on deputation in a foreign University because he had been granted extraordinary leave on loss of pay with guaranteed lien and seniority of service.

14. It was hesitantly contended by the counsel for the first respondent that the former Principal of the D.A. V. College had no authority to guarantee the appellant the lien on his post and his seniority rights and that such powers vested only with the University. This contention does not require examination because the Principal as the Head of the Institute, was undoubtedly competent to grant leave on loss of pay to the appellant in order to enable him to take up a foreign assignment on deputation basis. Once it is proved by the appellant that the period of leave was utilized in holding another position involving similar work the appellant is automatically entitled to the benefit of sub-cl. (4) of Old Statute 11.34. On account of this irrefutable position it is needless for us to consider whether the principal had acted within his powers or had exceeded his powers in committing the College to confer rights of lien and seniority status to the appellant when he was granted leave.

15. In the light of our conclusion the appeal has to succeed. Accordingly it will stand allowed and the judgment of the High Court is set aside. The parties will, bear their respective costs.

Appeal Allowed.



IT IS THE ESSENCE OF DEMOCRACY  
TO OBEY  
NO MASTER BUT THE LAW



## OBSERVATION

**Transfer of principal from one educational institution to another by imploring Sec. 16 G (2) (c) of Education Act after commencement of Services Commission Act—Not permissible—U.P. Secondary Education Services Commission and Selection Boards Act (5 of 1982), Secs. 16 and 32—U.P. Intermediate Education Act (2 of 1921), Sec. 21 G (2)(c)—Regulations under Education Act, Chap. III, Regn 55 to 62.**

## OBSERVED BY

Mr. P. N. Bhagwati, and R. S. Pathak  
 Hon'ble Chief Justice and Judge Supreme Court of India.

## IN

Civil Appeals Nos. 2072 of 1985 with 2628, 2696 and 4091-92 of 1985 with Spl. Leave Petn (Civil) No. 9552 of 1985 decided on 9-5-1986 in the case :

Om Prakash Rana, Appellant v. Swarup Singh Tomar and others, Respondents.

Uday Pratap Singh, Appellant v Subedar Singh Chauhan and others, Respondents.

District Inspector of Schools, Appellant v. Raghunandan Prasad Bhatnagar and other, Respondents.

Shashi Pal Singh, Petitioner v. State of U.P. and others, Respondents.

## TEXT

Pathak, J. :—The principal question in these appeals is whether, in view of the enactment of U. P. Secondary Education Services Commission and Selection Boards Act, 1982 and the Rules framed thereunder, the provisions contained in S. 16-G (2) (c) of the U.P. Intermediate Education Act, 1921 and Regulations 55 to 62 in Chapter III of the Regulations framed under that Act in respect of the transfer of a Principal from one Intermediate College to another continue to be of operative and effective.

2. The Intermediate Education Act, 1921 (shortly referred to as 'the Education Act') and the Regulation framed thereunder provide inter alia for the conditions of service of Heads and of the teachers of such educational institutions. The appointment of the Heads and of teachers of educational institutions in the State continued to be governed by the Education Act for several years, but with the passage of time it came to be felt that the selections of teachers under the provisions of that Act and the Regulations were not always



free and fair and moreover the field of selection was greatly restricted. As this adversely affected the availability of suitable teachers and the standards of education the Government of Uttar Pradesh Promulgated the U.P. Secondary Education Services Commission and Selection Services Commission and Selection Boards Ordinance 1981 on July 10, 1981 with a view to establishing a Secondary Education Services Commission and six or more Secondary Education Selection Boards for the selection of teachers in institutions recognised under the Education Act. The Ordinance was replaced subsequently by the enactment of the U. P. Secondary Education Services Commission and Selection Boards Act, 1982 (conveniently referred to as 'the Services Commission Act'). Thereafter the State Government framed Rules for carrying out the purposes of the Act. It was some time before the Services Commission and the Selection Boards could be constituted and therefore a number of Removal of Difficulties Orders were made by the State Government pursuant to power conferred under the aforesaid Ordinance and thereafter under the Commission Act.

3. We propose to take the appeal filed by Om Prakash Rana against Swarup Singh Tomar (Civil Appeal No. 2072 of 1985) as representative of the factual context in which the appeals arise. The Veer Smarak Intermediate College is an educational institution in Baraut in the district of Meerut. It is an institution recognised under the provisions of the Intermediate Education Act, 1921. On

June 30, 1982 the post of Principal of the College fell vacant on the retirement of the outgoing principal, Jai Singh. The Committee of Management resolved that Bhopal Singh, the then Principal of the Adarsh Vedic Intermediate College situated in the same district, should be invited to join the post of principal in the College. It was intended that the vacancy should be filled in accordance with provisions of the Education Act and the Regulations made thereunder which permitted the transfer of a principal from one institution to another. As the transfer could be effected only with the approval of the District Inspector of Schools, an application was made to the District Inspector of Schools. He refused to grant approval. On July 13, 1982 the District Inspector of Schools directed the Committee of Management to give charge of the post of Principal to the respondent Swarup Singh Tomar as officiating Principal. Three days later, the District Inspector of Schools superseded that order and directed that the respondent Swarup Singh Tomar should be appointed an ad hoc principal under the Removal of Difficulties order issued under the Services Commission Act. The Committee of Management of the College filed a writ petition in the Allahabad High Court against the order of the District Inspector of Schools, and during its pendency the High Court made an interim order in which it was recognised that Swarup Singh Tomar was functioning already as ad hoc principal of the institution. About this time, the appellant Om Prakash Rana,



who was Principal of the B.P. Intermediate College at Bijwara in the district of Meerut, requested the Committee of management of his College to relieve him in order to enable his transfer as Principal to the Veer Smarak Intermediate College. On November 22, 1982 the Committee of management passed a resolution accordingly. On December 3, 1982 the Committee of Management of the Veer Smarak Intermediate College resolved on accepting the appellant as Principal of the College on transfer from the other institution. On February 19, 1983, the District Inspector of Schools accorded his approval to the transfer.

4. Tomar now filed a writ petition in the Allahabad High Court. He obtained an interim order restraining the Committee of Management from permitting Rana to fill the post of principal of the College, but the interim order was vacated on March 9, 1983 and Rana has been working as Principal of the College ever since. On April 9, 1985 the High Court allowed the writ petition and quashed the order dated February 19, 1983, under which the District Inspector of Schools had accorded his approval to the transfer of Rana. In allowing the writ petition the High Court followed the Judgment of a Full Bench of the Court pronounced in *Raghunandan Prasad Bhatnagar v. Administrator ; Gandhi Vidyalaya Intermediate College, Khekra*, (Civil Misc, writ Petn. No. 10301 of 1983) : (reported in 1985 Lab IC 1648). That was a case

where the High Court re-examined the correctness of the views expressed by two Division Benches of the High Court in *Ratan Pal Singh v. Deputy Director of Education*, 1983 UP LB EC 34 and the Committee of Management, National Intermediate College, Abari Indara, District Azamgarh v. District Inspector of Schools, Azamgarh, 1983 U P LB EC 1983. The three learned Judges who heard the case were unable to come to a unanimous opinion, and by majority the Full Bench held that it was not permissible for the Committee of Management of an Intermediate College to fill the post of Principal of the College by the transfer of a principal from one Intermediate College to another after the commencement of the Services Commission Act.

5. To appreciate the scope and range of the contentions raised before us by the parties it is appropriate to set forth at the outset the relevant provisions of the two statutes and the pertinent Regulations. S. 16-G of the Education Act provides :

“16. G. Conditions of service of Head of Institutions, teachers and other employees—

(1) Every person employed in a recognised institution shall be governed by such conditions of service as may be prescribed by Regulations and any agreement between the management and such employee in so far as it is inconsistent with the provision of this Act or with the Regulations shall be void.



(2) Without prejudice to the generality of the powers conferred by sub-sec. (1), the Regulations may provide for—

(a) the period of probation, the conditions of confirmation and the procedure and conditions for promotion and punishment, including suspension pending or in contemplation of inquiry or during the pendency of investigation, inquiry trial in any criminal case for an offence involving moral turpitude and the emoluments for the period of suspension and termination of service with notice.

(b) the scales of pay, and payment of salaries,

(c) transfer of service from one recognised institution to another,

(d) grant of leave and Provident Fund and other benefits, and

(e) maintenance of record of work and service.”

The Regulations 55 to 62 detail the procedure to be followed when a permanent employee of an institution desires his transfer to another institution. An application for transfer is made to the Inspector of Schools. All applications for transfer are entered in a register. As soon as a substantive vacancy or a temporary vacancy likely to be made permanent and which is to be filled by direct recruitment is advertised, the Manager of the institution has to send a copy of the advertisement to the Inspector. The Inspector will arrange with the Management to see whether vacancy can be

filled suitably by one of the applicants for transfer. When the vacancy is not filled by transfer, the Management may proceed to fill it by direct recruitment. To enable the transfer to take place it is necessary that the Management of the institution where the applicant is serving should be willing to release him and that the Management of the institution to which the applicant seeks transfer should be willing to accept him. Apparently the appellant Rana relied on these provisions of the Education Act and the Regulations to obtain a transfer as Principal from the B. P. Intermediate College, Bijwara of the Veer Smarak Intermediate College, Baraut.

6. In anticipation of the promulgation of the Services Commission Ordinance the U.P. Government issued a Radiogram to all District Inspectors in the State directing them to stop all fresh selections and appointments of Principals, Head Master and teachers including recruitment by promotion in all non-Government aided Secondary Schools except Minority institutions, pending further orders. This was followed on July 19, 1981 by the Services Commission Ordinance, Clause 16 of the Ordinance provided that the appointment of a teacher (the expression teacher being defined to include a Principal) could be made by the Management only on the recommendation of the Commission and any appointment made in contravention of the clause would be void. Thereafter the Services Commission Act was enacted. S. 8 provides for establishing a



Commission to be called the "Uttar Pradesh Secondary Education Services Commission". It is to be a body corporate and entitled to exercise power throughout the State S. 10 provides:

'10(1) For the purposes of making appointment of a teacher specified in the Schedule, the management shall notify the vacancy to the Commission in such manner and through such officer or authority as may be prescribed.

(2) The procedure of selection of candidates for appointment to the posts of such teachers shall be such as may be prescribed;

Provided that the Commission shall with a view to inviting talented persons, give wide publicity in the State to the vacancies notified under sub-sec. (1)"

Section 11 details the procedure to be followed by the Commission after the notification of a vacancy under S. 10 for the purpose of holding interviews of the candidates and preparing a panel of those found most suitable for appointment. The names on the panel are to be forwarded to the Management of the institutions in accordance with the prescribed procedure and the Management is to appoint a candidate accordingly. S. 16 declares :

"16. (1) Notwithstanding to the contrary contained in the Intermediate Education Act, 1921 or the Regulations made there under but subject to the provisions of Ss 18 and 33 -

(a) every appointment of a teacher specified in the Schedule shall, on or after July 10, 1981, be made by the management only on the recommendation of the Commission.

(b) every appointment of a teacher (other than a teacher specified in the Schedule) shall, on or after July 10, 1981 be made by the management only on the recommendation of the Board :

Provided that in respect of retrenched employees, the provisions of S. 16-EE of the Intermediate Education Act, 1921 shall apply with the modification that in sub-sec. (2) of the aforesaid section, for the words six months the words 'two years' shall be deemed to have been substituted.

(2) Every appointment of a teacher, in convention of the provisions of sub-sec (1), shall be void."

Where a person is entitled to appointment as a teacher in any institution but is not so appointed by the Management, he is given the right to apply to the Director of Education, Uttar Pradesh for a direction to the Management to appoint him forthwith and to pay him salary from the date specified in the order S. 22 provides for the imposition of a penalty on any person appointing a teacher in contravention of the provisions of the Act. Such contravention constitutes an offence punishable with imprisonment which may extend to three years or with fine up to Rs. 5000/- or with both S. 32 or which much will be said hereafter, provides :



32. The provisions of the Intermediate Education Act 1921 and the Regulations made thereunder in so far as they are not inconsistent with the provisions of this Act or the Rules or Regulations made hereunder shall continue to be in force for the purposes of selection, appointment, promotion, dismissal, removal, termination or reduction in rank of a teacher."

7. Section 33 enables the State Government to pass orders for a period of two years from the date of commencement of the Act for the purpose of removing difficulties.

8. The central question is whether the enactment of the Services Commission Act results in the provisions of S. 16G (2) (C) of the Education Act and the Regulations made thereunder. If that is so, no transfer to the office of Principal in Intermediate Collges can be made, except if at all, in accordance with the provisions of the Services Commission Act. In this Connection, one point which arises is whether the transfer of a Principal from one College to another constitutes an appointment in the latter. is the case of the appellants that the power relating to appointments conferred on the Commission under the Services Commission Act does not in any way curtail the provisions regarding transfer set forth in the Education Act and its Regulations. It is urged that the right to apply for transfer is a condition of service of an employee, and neither expressly nor by necessary implication can it be said that the Services Commission Act

has abrogated that right. It is a facility provided to every employee and, it is said, there must be clear language before that right can be taken away. It is contended that it is perfectly possible to read the Education Act and its Regulations side by side with the Services Commission Act and infer therefrom that the power of transfer continues to co-exist under the former with the power relating to appointments conferred on the Commission under the latter. There is no inconsistency between two powers, it is submitted, and that is apparent when S. 32 of the Services Commission Act deals with the effect of the inconsistency between the provisions of the Education Act, and the Regulations made thereunder, and the provisions of the Services Commission Act, and its Rules and Regulations, in regard to the selection, appointment, promotion, dismissal, removal, termination or reduction in rank of a teacher. This submission is based on the premises that the power of transfer is not encompassed within the power of appointment. So it is said that S. 16G (2) (C) of the Services Commission Act which provides that the appointment of a Principal can be made the Management only on the recommendation of the Commission does not bar the transfer of a Principal from one College to another.

9. As is clear by now, the fundamental basis of the contention that the power of transfer under the Education Act and its Regulations continues in force even after the enactment of the Services Commission Act rests on the assumption that the power of appointment



ent does not include the power of transfer. In our opinion, the assumption is unsustainable. The scheme under the Education Act envisages the appointment of a Principal in relation to a specific college. The appointment is in relation to that College and to no other. Moreover, different Colleges may be owned by different bodies or organisations, so that each Principal serves a different employer. Therefore, on filling the office of a Principal to a College a new contract of employment with a particular employer comes into existence. There is no State-level service to which Principals are appointed. Had that been so, it would have been possible to say that when a Principal is transferred from one College to another no fresh appointment is involved. But when a principal is appointed in respect of a particular College and is thereafter transferred as a Principal of another College it can hardly be doubted that a new appointment comes into existence. Although the process of transfer may be governed by considerations and move through a machinery different from the considerations governing the appointment of a person as Principal, the nature of the transaction is the same, namely, that of appointment, and that is so whether the appointment be through direct recruitment, through promotion from the teaching staff of the same institution or by transfer from another institution.

10. It is pointed out that when S. 10 of the Service Commission Act requ-

ires that for the making of an appointment of a teacher the Management must notify the vacancy to the Commission, does not speak of "every vacancy", and designedly leaves the possibility open of some vacancies being filled by transfer. This submission is also without substance. A survey of the provisions of the Service Commission Act makes it abundantly clear that the entire matter of selecting teachers for recognised institutions is intended to be governed by the Services Commission Act. As the Preamble of the Act itself suggests, that is the whole purpose of establishing the Services Commission. S. 3 envisages the Commission as a body corporate, an entity of continuing existence, manned by persons of eminence and distinction from the judicial services and the educational services and selected academicians with a superior level of teaching experience and armed with a carefully delineated power to select teachers, through a detailed procedure intended to select the best. No wonder then that S. 16 (1) mandates that "every appointment" of a principal can be made by the Management "only on the recommendation of the Commission". S. 16 (2) goes further. It declares that every appointment made in contravention of S. 16 (1) shall be void. It is only in exceptional cases where the Commission has failed to recommend the name of a suitable candidate for appointment within one year from the date of notification of the vacancy, or the post has actually remained vacant for more than two months then, under S. 18 (1), the Man-



agement may appoint, by direct recruitment or promotion, a teacher on a purely ad hoc basis from amongst the persons possessing qualifications prescribed under the Education Act or the Regulations made thereunder. S 22 demonstrates how absolute is the ban on appointing a teacher through a procedure outside the provisions of the Services Commission Act, for the section provides that any person who appoints a teacher in contravention of the provisions of that Act shall, on conviction, be punished with imprisonment for a term which may extend to three years or with fine which may extend to 5000 rupees or with both. Any doubt remaining is removed completely by S. 32 of the Services Commission Act which permits the provisions of the Education Act and its Regulations to continue in force in so far only as they are not inconsistent with the provisions of the Services Commission Act, its Rules and its Regulations in the matter of the selection and appointment, among other things, of a teacher.

11. We are firmly of opinion that no duality in the source of power is contemplated in the matter of filling the office of Principal of a College. It is not possible to contemplate that transfer can be effected with the approval of the District Inspectors of Schools under the Education Act and its Regulations, while appointment (other than by transfer) can be made upon the recommendation of the Commission. The control over all appointments is exercised by a single source of power, namely the Commission under the Services Commission

Act. It is no longer possible to invoke S. 16-G (2) (c) of the Education Act and its Regulations and transfer of Principal from one institution to another. The context in which those provisions operate, the authority conferred for that purpose and the conditions subject to which it can be exercised stand completely superseded by the corresponding provisions of the Services Commission Act, its Rules and Regulations. That is amply demonstrated by the declaration in S. 16 of the Services Commission Act which mandates that the appointment of a Principal shall be made only on the recommendation of the Commission "notwithstanding anything to the contrary contained in the Intermediate Education Act, 1921 or the Regulations made there under." The scheme set forth in the Services Commission Act enacts a complete code in the matter of selection of teachers, and resort is no longer permissible to the provisions of the Education Act and its Regulations for that purpose. Where the Services Commission Act intended that any provision of the Education Act pertaining to the appointment of a teacher should continue in force, it expressly provided for such saving. For example, the provision to S. 16 (1) of the Services Commission Act enacts that the provisions of S. 16 EE of the Education Act which provide for the absorption of retrenched employees against permanent vacancies shall apply with certain modifications.

12. A submission on behalf of the appellant is that the power to transfer the service of a teacher from one institu-



tion to another under S. 16-G (2) (c) of the Education Act is a condition of service and should not be identified with the power of appointment. We have already explained that in its essential nature the transfer of a teacher from one institution to another implies the cessation of his appointment in the former institution and his appointment to the latter. It will also be noticed that the selection of teachers of the categories mentioned in the Schedule to the Services Commission Act has been considered by the State Legislature of such manifest importance that a high powered Commission has been envisaged for discharging that function. It is Commission consisting of persons holding positions of eminence in the Judicial Services or in the State Education Services or with teaching experience as. University Professors and College Principals. It is intended that whenever a vacancy arises in the post of a teacher the Commission must be notified of it. In the selection in a teacher the Commission has been charged with the responsibility of inviting talented persons and selecting the best from among them. The selection has to be made in the context of the particular needs and requirements of the College. It is a responsibility of grave magnitude, the appointment of the head of an educational institution, and therefore most appropriately entrusted to the vision, wisdom and experience of a high powered body, the Commission. To contemplate that a vacancy can be filled by transfer, even subject to the approval of the District Inspector of Schools, is

to admit the possibility of an appointment which does not measure up to the high standards and norms which the Commission can, having regard to its composition and status, be expected to apply. The Commission, as we have mentioned earlier, is envisaged as a corporate body constituted for the entire State and in the selection of teachers as Principals and Lecturers of Intermediate Colleges and as Headmasters of High Schools and Trained Graduate Grade teachers of Higher Secondary Schools (the categories of teachers detailed in the Schedule), it can also be expected to bear in mind the needs and standards of education designed for the entire State. The object of the services Commission. Act would be defeated if vacancies to posts of such responsibility and obvious importance in the field of education can be filled by bypassing the Commission and making appointments by transfer under S. 16-G (2) (c) of the Education Act. As the Services Commission Act stands to day, no appointment by such transfer can be envisaged to those vacancies which fall within the responsibilities of the Commission.

13. Our attention has been invited to the circumstance that even after the coming into force of the Services Commission Act the State Government has made amendments to the Regulations under the Education Act relating to the transfer of service under S. 16 G (2) (c) of the Education Act. It is urged that the making of such amendments indicates the belief in the State Government that S. 16-G (2) (c) of the Education Act



continues to be operative. It is permissible to say, we think, we that the making of those amendments cannot alter the true construction of the scope of the enactments under consideration. It may have been another thing altogether if an amendment had been made to S. 16-G (2) (c) of the Education Act itself, from which an inference may have been possible that the State Legislature, when amending that provisions on the basis that it continues in operation, has given clear indication thereby that it was never intended that the provisions of the Services Commission Act should supersede S. 16 G (2) (c) of Education Act.

14. In view of the aforesaid consideration, we hold that upon the constitution of a Commission under the Services Commission Act it is no longer possible for a vacancy in the post of Principal, Headmaster or teacher of the categories mentioned in the Schedule to the Services Commission Act to be filled by the process of transfer under S. 16-G (2) (c) of the Education Act and its Regulations. On this point we find ourselves in agreement with the majority opinion of the Full Bench of the High Court in Raghunandan Prasad Bhatnagar (1985 Lab IC 16-41) (supra) and are unable to agree with what has been said by the Division Benches of that Court in Ratan Pal Singh 1983 UPLBEC 34) (supra) and the Committee of Management, National Intermediate College, Adari Indara, District Azamgarh (1983 UPLBEC 198 (supra).

15. As the mandate imposed by S.

16 (1)(a) of the Services Commission Act that the appointment of a Principal of an Intermediate College shall, on or after July 10, 1981 be made only on the recommendation of the Commission, and inasmuch as the appointment by transfer of the appellant as Principal of the Veer Smarak Intermediate College took place after that date, the appointment of the appellant must be regarded as void.

16. The majority in Raghunandan Prasad Bhatnagar (1985 Lab IC 1648) (supra) has observed that S. 16-G (2)(c) of the Education Act should be limited to cases of mutual transfer of services between teachers serving in different institutions. We find it difficult to accept the accuracy of that observation, having regard to the view taken by us that S. 16-G (2) (c) of the Education Act cannot be pressed into service at all now in regard to vacancies intended to be filled on the recommendation of the Commission under the Services Commission Act.

17. An attempt was made by the appellant to show that the respondent Tomar is not entitled to continue as Principal of the Veer Smarak Intermediate College and our attention was invited to the provision of successive U. P. Secondary Education, Services Commission (Removal of Difficulties) Order. Having regard to the finding that the appellant can have no claim to the office of Principal of that College on the basis of the transfer effected in favour, we do not think it is open to him to challenge the continuation of the respondent Tomar in that office.



18. Civil Appeal No. 2072 of 1985 fails and is liable to be dismissed.

19. Civil Appeals Nos. 4091-4092 of 1985 have been filed by the District Inspector of Schools, Meerut in support of the claim of Om Prakash Rana and as they raise the same questions as Civil Appeal No. 2072 of 1985 filed by Om Prakash Rana, learned counsel for the District Inspector of Schools adopts the submission made by learned counsel for Om Prakash Rana.

20. Civil Appeals Nos. 2628 and 2696 of 1985 arise out of substantially similar facts, and those appeals will also be governed by the view taken in the appeal preferred by Om Prakash Rana.

21. A Special Leave petition (S.

L. P. (C) No. 9542 of 1985) has been filed by Shahi Pal Singh praying for special leave to appeal against the judgment and order of the Allahabad High Court in which the High Court, following its view in Raghunandan Prasad Bhatnagar, (1985 Lab IC 1648) (supra) has quashed the appointment of the transferee principal

22. Upon the considerations which have found favour with us, the aforementioned appeal leave petition must fail.

23. In the result, all these appeals and the special leave petition are dismissed. There is no order as to costs.

Appeals and special leave  
petitions dismissed.

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IT IS THE ESSENCE OF DEMOCRACY  
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A. P. Sen

Judge

Supreme Court of India

### OBSERVATION

**Discharge from service—Whether simpliciter or by way of punishment—Lady constable discharged from service, as stated on ground of inefficiency—Enquiry revealed that lady constable was staying in nights with male constable—Neither charge sheet served nor provided the opportunity to be heard her—Held, order of discharge though apparently innocuous amounted to dismissal on ground of misconduct—Order is liable to be quashed and set aside due to violation of Constitution of India, Art. 311 (2)—Punjab Police Rules, 1934 Vol. 7, R. 12.21.**

### OBSERVED BY

A. P. Sen and B. C. Ray

Hon'ble Judges Supreme Court of India

### IN

Civil Appeal No. 2327 decided on 8-8-1986. in the case of Smt. Rajinder Kaur, Appellant v. Punjab State and another, Repondents.

### TEXT

Judgment :— After hearing the learned counsel for both the parties and on consideration of the question of law involved in this petition, special Leave is granted. Arguments heard.

2. The appellant petitioner was appointed as a lady constable in Hoshiarpur District on 7-5-1979. After completion of training she was posted in March, 1980 in the police lines, Hoshiarpur. The superintendent of Police, Hoshiarpur discharged the appellant from service by an order dated 9-9-1980 under R. 12.21, Volume 7 of the Punjab Police Rules, 1934. The said order is in following terms :

“Lady Constable Rajinder Kaur No. 732 is unlikely to prove an efficient

police officer. She is, therefore, hereby discharged from the Police Force under P. P. R. 12.21 with effect from today (9-9-1980).

Issue orders in O. R. and all concerned to notice and necessary action.”

3. This order was made, it has been stated in the petition, without serving any charge-sheet on her and without asking her to explain any charge. The order also has not recorded any reason for her discharge from service. Against this order the appellant made a representation to the Deputy Inspector General of Police, Jullunder Range. The said representation was rejected on 17.10.1980. 1980. The appellant filed a revision against the order of the Deputy Inspect-



or General of Police and the same was also dismissed on 15-4-1981. The appellant thereafter filed a Civil Suit No. 327/ASSJ/82 in the Court of Additional Senior Sub-Judge, Hoshiarpur on 16-11-1981 challenging the order of discharge as bad arbitrary and against the principles of law. The said suit was dismissed by the Additional Senior Sub-Judge, Hoshiarpur on 28-2-1983. Thereafter, the appellant filed an appeal before the District Judge, Hoshiarpur on 31-10-1983 and it was numbered as Civil Appeal No. 45 of 1983. The said appeal was dismissed on 7-5-1984 and the judgment of the trial Court was confirmed. A Regular Second Appeal No. 2198 of 1984 was filed before the High Court of Punjab and Haryana at Chandigarh. The said Second appeal was dismissed on 10-10-1984. Hence the instant application for grant of special leave to appeal under Art. 136 of the Constitution has been filed in this Honourable Court by the appellant.

4. The main argument advanced on behalf of the appellant is that the impugned order of discharge from service was made not in accordance with R. 12.21 of the Punjab Police Rules, 1934 in accordance with the terms and conditions of the service but was made by way of punishment. An enquiry was made by Deputy Police Superintendent, Garhshankar as to the character of the appellant into the allegation that She stayed at Mahalpur for 1 or 2 nights with one constable, Jaswant singh and evidences were recorded therein without

giving the appellant any opportunity of hearing in the enquiry and without giving her any opportunity to cross-examine the witnesses and the impugned order was made after the completion of the investigation on the ground of her misconduct which cast a stigma on her service career. The order in question is therefore, not an innocuous one though expressed in innocuous terms. It is made by way of punishment, the ground being her misconduct as found on the basis of the investigation and certain allegations behind her back.

5. It was urged on behalf of the respondents that the order discharging the appellant from service was not made by way of punishment. The order was made in accordance with the terms of R. 12.21 of the said Rules which empowers the authorities to do away with the service of the constable at any time within three years of her enrolment, if she is found unlikely to prove an efficient Police officer, by the Superintendent of police and no appeal has been provided for under the Rules against the said order of discharge. It was, therefore, urged that the order being made in accordance with the conditions of service of the appellant and so it is unchallengeable before this Court by filing a special leave petition to appeal.

6. Admittedly, the appellant was appointed as a lady constable on 7-5-1979 and She was posted in March, 1980 in the Police lines, Hoshiarpur after completion of her training. It has been stated in para 15 of the petition that on



an allegation made by the department against the appellant that she spent two nights with a constable an investigation was caused to be made into the said allegation against her conduct and on the basis of that investigation the impugned order of discharge was made by the Superintendent of Police, Hoshiarpur. In para 15 of the counter-affidavit sworn on behalf of respondents it has been stated that the Superintendent of police, Hoshiarpur, got conducted a confidential enquiry through a Deputy Superintendent of Police regarding the conduct of the appellant. On an overall assessment of the work and conduct of the appellant, the Superintendent of Police, Hoshiarpur came to the conclusion that she was not likely to become an efficient Police Officer and thus passed an order discharging her from service in accordance with the conditions of the service. These averments made in para 15 of the counter-affidavit have been verified to be true and correct to the knowledge of the deponent based upon the information derived from the record of the case. Thus, it is clear from these averments that the impugned order of discharge though stated to be made in accordance with the provisions of R. 12.21 of the Punjab Police Rules, 1934 is really made on the basis of the misconduct as found on enquiry into the allegation behind her back by the Deputy Superintendent of Police, Garhshankar. It is not disputed that the enquiry was made without serving her the charge-sheet and without giving her any opportunity to explain the charges and the allegations levelled against

her. The enquiry was conducted behind her back and on the basis of the result of the investigation she was discharged from service. Therefore in these circumstances, it does not lie in the mouth of the respondents to submit before this court that the order is an innocuous one and it is an order made simply in accordance with the conditions of her service under R. 12.21 of the said Rules. On the other hand, in the background of these facts and circumstances it is crystal clear that the impugned order of discharge from service of the appellant was made on the ground of her misconduct and it is penal in nature as it casts a stigma on the service career of the appellant.

7. The next question that arises is whether the appellant who is yet to be confirmed in the service and has no right to the post in question, the impugned order can be assailed as violative of the protection given by Art. 311 (2) of the Constitution. This point has been well-settled by several decisions of this Court.

8. This Court has stated in no uncertain terms in the case of *P.L. Dhingra v. Union of India*, 1958 SCR 828 at p. 862 : (AIR 1958 SC 36 at p. 49) as follows :

“But even if the Government has, by contract under the rules, right to terminate the employment without going through the procedure prescribed for inflicting the punishment of dismissal or removal or reduction in rank, the Government may, nevertheless, choose to



punish the servant and if the termination of service is sought to be founded on misconduct, negligence, inefficiency or other disqualification, then it is a punishment and the requirements of Art. 311 must be complied with."

9. This decision has been relied upon by this Court in the case of *K. H. Phadnis v. State of Maharashtra*, 1971 (supp) SCR 118; (AIR 1971 SC 998) where it has been held that even in the case of reversion of an employee who has been repatriated from the temporary post of Controller of Food Grains Department to his parent department of excise and Prohibition, to which he had a lien might be sent back to the substantive post in ordinary routine administration or because of exigencies of service. Such a person may have been drawing a salary more than that of his substantive post but when he is reverted to the parent department the loss of salary cannot be said to have any penal consequences. The matter has to be viewed as one of substance and all relevant factors have to be considered in ascertaining whether the order is a genuine one of accidence of service in which a person sent from the substantive post to a temporary post has to go back to the parent post without any aspersion against his character or integrity, or whether the order amounts to a reduction in rank by way of punishment.

10. It has been further observed by this Court in the case of *State of Bihar v. Shiva Bhukshuk Mishra*, (1971) 2 SCR 191 at p. 196: (AIR 1971 SC

1011 at p. 1014):

"The form of the order is conclusive of its true nature and it might merely be a cloak and camouflage for an order founded on misconduct. It may be that an order which is innocuous on the face and does not contain any imputation of misconduct is a circumstance or a piece of evidence for finding whether it was made by way of punishment or administrative routine. But the entirety of circumstances preceding or attendant on the impugned order must be examined and the overriding test will always be whether the misconduct is a mere motive or is the very foundation of the order."

11. In the case of *Shamsher Singh v. State of Punjab*, (1975) I SCR 814 at p. 837: (AIR 1974 SC 2192 at p. 2205) it has been observed as under:—

"No abstract proposition can be laid down that where the services of a probationer are terminated without saying anything more in the order or termination than that the services are terminated it can never amount to a punishment in the facts and circumstances of the case. If a probationer is discharged on the ground of misconduct, or inefficiency or for similar reason without a proper enquiry and without his getting a reasonable opportunity of showing cause against his discharge it may in a given case amount to removal from service within the meaning of Art. 311 (2) of the Constitution."

12. It has been observed by this court in the case of *Anoop Jaiswal v.*



Government of India, (1984) 2 SCR 453 :AIR 1984 SC 636) as under : -

“Where the form of the order is merely a camouflage for an order of dismissal for misconduct it is always open to the Court before which the order is challenge to go behind the form and ascertain the true character of the order. If the Court holds that the order though in the form is merely a determination of employment is in reality a cloak for an order of punishment, the Court would not be debarred, merely because of the form of the order, in giving effect to the rights conferred by law upon the employees.”

13. On a conspectus of all these decisions mentioned herein before the irresistible conclusion follows that the impugned order of discharge though couched in innocuous terms, is merely a camouflage for an order of dismissal from service on the ground of misconduct. This order has been made without serving the appellant any charge

sheet, without asking for any explanation from her and without giving any opportunity to show cause against the purported order of dismissal from service and without giving any opportunity to cross-examine the witnesses examined, that is, in other words the order has been made in total contravention of the provisions of Art 311 (2) of the Constitution. The impugned order is, therefore, liable to be quashed and set aside. A writ of certiorari be issued on the respondents to quash and set aside the impugned order date 9-9-1980 of her dismissal from service. A writ in the nature of mandamus and appropriate directions be issued to allow the appellant to be reinstated in the post from which she has been discharged. The appeal is thus allowed with costs. The authorities concerned will pay all her emoluments to which she is entitled to in accordance with the extant rules as early as possible in any case not later than eight weeks from the date of this judgment.

Appeal allowed.



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## OBSERVATION

**(A) Premature retirement—Judicial service—Governor passing order, only recommendation of Administrative Judge and not on recommendation of Administrative Committee or Full Court—Order of premature retirement of District and Sessions Judge, held, was void—Constitution of India, Arts. 232, 225—Allahabad Rules of Court, (1952), Chap. 3, Rr. 3 to 5).**

**(B) Premature retirement—Judicial service—Government cannot take the initiative to retire prematurely, a judicial officer—Such initiative should rest with the High Court.**

## OBSERVED BY

**E. S. Venkataramiah and Ranganath Misra**  
**Hon'ble Judges Supreme Court of India**

## IN

Civil Appeal No. 1243 of 1972 decided on 5-8-1986 in the case of Tej Pal Singh, Appellant v. State of U.P. and another, Respondents.

## TEXT

Venkataramiah, J. :— The appellant was working as an Additional District and Session Judge in the State of Uttar Pradesh in the year 1968. His date of birth was April 1, 1913. He would have retired from service on the expiry of March 31, 1971 on completing 58 years of age. But on September 3, 1968 the appellant was served with an order dated August 24, 1968 issued by the Secretary to the Government of Uttar Pradesh (Home Department) stating that the Governor of Uttar Pradesh in exercise of the powers under para (i) of the first proviso to clause (a) of Fundamental Rules 56 contained in the Financial Hand

Book, Volume II, Para II to IV, as amended from time to time, had been pleased to order that the appellant should retire from service on the expiry of three months from the date of service of the notice. Aggrieved by the said notice of premature retirement, the appellant filed Writ Petition No. 3958 of 1986 before the High Court of Allahabad under Article 226 of the Constitution urging Inter alia (i) that the retirement of the appellant as per order dated August 24, 1968 had been ordered without the recommendation of the High Court as required by Article 235 of the Constitution, (ii) that Fundamental



Rule 56 under which the impugned order had been issued was violation of Articles 14 and 16 of the Constitution, and (iii) that the appellant's premature retirement was in violation of Article 311 (2) of the Constitution. The question relating to the validity of Fundamental Rule 56 was involved in two other cases which were pending before the High Court. The Writ Petition filed by the appellant and the other two writ petitions were heard together by a Division Bench of the High Court. The Division Bench referred all the three matters to a Full Bench to consider two specific questions of law, namely (i) whether under Fundamental Rule 56 the age of superannuation was 55 or 58 years and (ii) whether the proviso to clause (a) of Fundamental Rule 56 violated Articles 14 and 16 of the Constitution. Thereafter the Full Bench heard all the three cases and answered the two questions as follows : (i) Under clause (a) of Fundamental Rule 56 the age of superannuation was 58 years and (ii) Paragraph (i) of the proviso to clause (a) of the Fundamental Rule 56 violated Articles 14 and 16 of the Constitution. The judgment of the Full Bench was pronounced on September 26, 1969. Immediately thereafter the Governor of Uttar Pradesh issued an Ordinance dated November 5, 1969 making amendments to Fundamental Rule 56 and validating actions already taken thereunder. The Ordinance was replaced by U. P. Act No. 5 of 1970 on April 1, 1970. The appellant sought the amendment of the Writ Petition questioning the validity

of the Ordinance and the Act. The Writ Petition was heard by a Division Bench of the High Court and it came to be dismissed on February 1, 1970. This appeal by certificate is filed against the judgment of the High Court.

2. In this case we are not concerned much with the validity of Fundamental Rule 56 since it can be disposed of on the ground based on Article 235 of the Constitution.

3. The undisputed facts as can be gathered from the records in this case which are relevant for purposes of this appeal are these. The State Government moved the High Court in the year 1967 for the premature retirement of the appellant. On July 8, 1968 the Administrative Judge agreed with the proposal of the State Government to retire the appellant prematurely after giving him 'three months' notice. The Government passed the order of retirement on August 24, 1968. Three days thereafter, on August 27, 1968 the Administrative Committee of the High Court gave its approval to the recommendation of the Administrative Judge earlier communicated to the State Government. Thereafter on August 30, 1968 the Additional Registrar transmitted the order of retirement to the appellant. It was actually served on September 3, 1968. The question for consideration in this case is whether the order of compulsory retirement issued against the appellant satisfies the requirements of the Constitution.

4. Article 235 of the Constitution provides that the control over district



courts and courts subordinate thereto including the posting and promotion of and the grant of leave to persons belonging to the judicial service of the State and holding any post inferior to the post of District Judge shall be vested in the High Court. It has been held in *State of Uttar Pradesh V., Batuk Deo Patil Tripathi* (1978) 3 SCR 131 : (1978) All LJ 47J) that premature retirement of Judges of District Courts and of subordinate courts is a matter which falls squarely within the power of control vested in the High Courts by Article 235 of the Constitution without the recommendation of the High Court it is not open to the Governor to issue an order retiring prematurely Judges of District Courts and of subordinate courts.

5. Insofar as the High Court of Allahabad is concerned rules are framed under Article 225 of the Constitution and all other powers enabling it in that behalf by the High Court regarding the manner in which the administrative work of the High Court should be carried out. They are known as Rules of Court, 1952. The relevant rules are found in chapter III of the Rules of Court, 1952. The material part of Chapter III is set out below :—

### CHAPTER III

#### Executive and Administrative

#### Business of the

#### Court

1. Subject to these Rules, a Committee of Judges composed of the Chief

Justice, the Judge in the Administrative Department and five other Judges to be appointed by the Chief Justice, referred to in these Rules as the Administrative Committee, shall act the Court. The Chief Justice shall have the Charge of, and may act for the Court in the Administrative Department and the executive and administrative business pertaining to the Court, except, that the Judge in the Administrative Department shall have charge of, and may act for the Court in Administrative Department and the executive and administrative business pertaining to the Courts subordinate to the Court. As far as possible, the Judge in the Administrative Department shall discharge his duties and functions in consultation with the Inspection Judges concerned, who shall be appointed by the Chief Justice from time to time.

The membership of the Committee shall be for two years except in the case Chief Judge and the Judge in the Administrative Department.

2. From time to time and as occasion arises the Chief Justice shall nominate one of the Judges to act as the Judge in the Administrative Department, whose terms of office shall be three years unless renominated.

3. All executive and administrative business and all business in the Administrative Department requiring orders shall be submitted by the Registrar to the Chief Justice or the Judge in the Administrative Department, as the case may be, together with his



comments thereon, if any, and may subject to these Rules, be disposed of by that Judge.

4. The Judge in the Administrative Department shall, before passing final orders cause to be circulated for the information of the Judges of the Administrative Committee then present in Allahabad, his recommendations as to the appointment, promotion or suspension of judicial officers.

Should any Judge dissent from such recommendations, he shall signify his dissent and his reasons therefor in writing.

5. (1). In regard to the following matters the Judge in the Administrative department shall consult the administrative Committee either by circulating the papers connected with the matter together with his own opinion or recommendation thereon to the members of the Committee then present in Allahabad or by laying in before a meeting of the Administrative Committee, namely :

(a) the issue of General Letters to subordinate courts;

(b) the issue of directions regarding the preparation of returns and statements ;

(c) all matters of importance upon which the Government desires the opinion of the Court ;

(d) appointment of the U. P. Higher Judicial Service; and

(e) any other matter which the Chief Justice or the Judge in the Administrative Department may consider fit to be laid before it for consideration.

(2) Copies of all General Letters issued to subordinate courts shall be circulated to all Judges for information as soon as may be after issue.....

(7) As soon as the Administrative Committee has disposed of any business, a statement showing what matters were laid before the Committee and the manner in which they were disposed of shall be circulated for information to all Judges except such Judges as may be on leave."

6. In the above decision *State of Uttar Pradesh v. Batuk Deo Patil Tripathi* (1978 All LJ 477) (supra) this Court has held that the power of the High Court under Article 235 of the Constitution to make recommendation to the Government to retire a subordinate judicial officer prematurely could be exercised by the Administrative Committee of the High Court. In the instant case, it is seen that the Administrative Committee of the High Court came into the picture only after the State Government had passed the order of retirement. It was no doubt true that the Administrative Judge had agreed with the proposal of the State Government to retire the appellant prematurely on July 8, 1968 and that on the basis of the opinion expressed by the Administrative Judge the Governor had passed the order on August 24, 1968. It was only on August



27, 1968 the order of the Governor was placed before the Administrative Committee of the High Court when it gave its approval to the opinion of the Administrative Judge earlier communicated to the State Government. After the Administrative Committee had expressed its opinion the matter was not again referred to the Governor at all. After the Administrative Committee had approved the opinion of the Administrative Judge the order of retirement was served on the appellant on September 3, 1968. It is thus seen that the Governor had not acted in the instant case on the basis of the recommendation of either the Full Court or of the Administrative Committee had approved the opinion of the Administrative Judge the order of retirement was served on the appellant on September 3, 1968. It is thus seen that the Governor had not acted in the instant case on the basis of the recommendation of either the Full Court or of the Administrative Committee of the High Court but only on the opinion of the Administrative Judge.

7. The two learned Judges who finally heard the Writ Petition of the appellant dealt with the question of compliance with Article 235 of the Constitution in the two separate Judgments delivered by them. Both the learned Judges, we regret to say, missed the essence of the question agitated before them. They have referred to Article 233 of Constitution in the course of their judgment while the proper Article which arose for consideration before

them was Article 235 of the Constitution. Both the learned Judges have taken the view that the Governor is only expected to consult the High Court on the question when he proposes to make an order of premature retirement in respect of a District Judge or a subordinate judicial officer. They have overlooked that the Governor can pass such an order only on a recommendation made by the High Court or the Administrative Committee. The second error committed by both of them is that they have held that such consultation with the High Court is permissible even after the Governor has passed the order of compulsory retirement. Thirdly, they have equated the recommendation that should be made by the High Court before a judicial officer can be prematurely retired to the consultation contemplated under Article 320 (3) (c) of the Constitution, which provides that the Union Public Service Commission or the State Public Service Commission as the case may be, shall be consulted on all disciplinary matters affecting a person serving under the Government of India or the Government of a State in a civil capacity, including memorials or petitions relating to such matters, and have held relying upon a decision of this Court in *State of U. P. v. Manbodhan Lal Srivastava* 1958 SCR 533 : (AIR 1957 SC 912) that such consultation was not mandatory and that failure to do so did not afford a cause of action to the appellant in a court of law.

8. In *State of Haryana v. Inder Prakash Anand* H. C. S. 1976 (Supp)



SCR 603 : (AIR 1976 SC 1841) this Court has held that Article 235 of the Constitution vests in the High Court control over district courts and courts subordinate thereto. This "control" includes both disciplinary and administrative jurisdiction. Disciplinary control means not merely jurisdiction to award punishment for misconduct, but also the power to determine whether the record of a member of the service is satisfactory or not so as to entitle him to continue in service for the full term till he attains the age of superannuation. Administrative, judicial and disciplinary control over members of the judicial service is vested solely in the High Court. Premature retirement is made in the exercise of administrative and disciplinary jurisdiction. It is administrative because it is decided in public interest to retire him prematurely and it is disciplinary, because, the decision is taken in public interest that he does not deserve to continue up to the normal age of superannuation. The fixation of the age of superannuation is the right of the State Government. The curtailment of that period under rules governing the conditions of service is a matter pertaining as well as administrative control. The control which is vested in the High Court is complete control subject only to the power of the Governor in the matter of appointment, dismissal, removal or reduction in rank and the initial posting of and initial promotion to the rank of District Judge. The vesting of complete control over

the subordinate judiciary in the High Court, leads to this that if the High Court is of opinion that a particular officer is not fit to be retained in service the High Court will communicate that opinion to the Governor, because, the Governor is the authority to dismiss, remove or reduce in rank or terminate the appointment. In such cases, the Governor, as the head of the State, will act in harmony with the recommendation of the High Court as otherwise the consequences will be unfortunate. But compulsory retirement simpliciter does not amount to dismissal or removal or reduction in rank under Article 311 or under service rules. When a case is not of removal or dismissal or reduction in rank, any order in respect of exercise of control over the judicial officers is by the High Court and by no other authority; otherwise, it will affect the independence of the judiciary. It is in order to effectuate that high purpose that Article 235 of the Constitution, as construed by this Court in various decisions, requires that all matters relating to the subordinate judiciary including premature retirement and disciplinary proceedings but excluding the imposition of punishment falling within the scope of Article 311 of the Constitution and the first appointment on promotion should be dealt with and decided upon by the High Courts in exercise of the control vested in them.

9. In High Court of Andhra Pradesh v. V. V. S. Krishnamurthy (1979) 1 SCR 26 ; this Court has again observed



that Article 235 of the Constitution is the pivot around which the entire scheme of the Chapter VI of Part VI of the Constitution revolves. Under it the control of district courts and courts subordinate thereto including the posting and promotions of and the grant of leave to persons belonging to the judicial service of a State is vested in the High Court. After considering a number of decisions, the Court in that cases has set out the true legal position crystallized by the said decisions as regards the scope of the control of the High Court over the subordinate judiciary vested in it under Article 235 of the Constitution. The Court proceeded to observe that the said power under Article 235 of the Constitution was exclusive in nature, comprehensive in extent and effective in operation. Amongst the several matters which fell within its scope, this Court was of the view that premature retirement of Judges of the district courts and of the subordinate courts was one.

10. It is thus clear that the High Court was in error in not construing the applicability, and the scope of Article 235 of the Constitution while deciding the case before it. It assumed that the Governor after consulting the High Court could pass an order of premature retirement in respect of a District Judge or a subordinate judicial officer and even if he did not consult in that regard the order of premature retirement passed by the Governor would not be vitiated and that in any event it was an irregu-

arity which could be cured by rule 21 of the Court Rules, 1952.

11. The relevant passages in the judgments of the two learned Judges who decided the case in the High Court are given below :

“(Per D. S. Mathur, J.)

In the case of premature retirement consultation, if made subsequently, but before the officer actually retires, that is, hands over charge, cannot in each and every case be said to be illusory and not genuine. It is only when it appears that after the passing of the order of compulsory retirement, the High Court did not consider the matter on merits but accepted the *fait accompli*, it can be said that there had been no consultation as contemplated by Article 233(1); but where the High Court did consider the matter on merits and agreed with the order passed by the Governor directing the compulsory retirement of a judicial officer, there would be no defect, considering that the order of retirement shall take effect from the date of communication or from the date the government servant is to retire from service. In the instant case, three months' notice was given, that is, the officer was to retire from service on the expiry of three months from the date of communication of the order of retirement. Within this period the matter could be considered on merits by the High Court on its own or on a representation made by the officer. We are, therefore, of opinion that the consultation of the High Court cannot be declared invalid



simply because there was no proper and full consultation before the passing of the order of premature retirement, provided that the facts and circumstances of the case made it evident that the High Court had not been unduly influenced by the decision of Governor and the High Court had on its own and independently considered the matter on merits.

Reference may now be made to rule 21 of Chapter III of the Rule of Court which clearly provides that no irregularity in, or omission to follow, the procedure laid down in this Chapter shall affect the validity of any order passed or anything done under these rules. This rule cannot cover a case where any order was passed in complete disregard of the rules contained in Chapter III; but on irregularity committed in good faith shall not invalidate the order. The principles governing the provisions like section 5 of the Limitation Act can easily be made applicable to a case of the present nature. Where two opinions are possible the irregularity, if any, cannot be deemed to have been committed in bad faith and such irregularities shall be covered by the above rule 21."

“(per Satish Chandra, J.)

Under Chapter III rule 5 the Administrative Judge had to consult the Administrative Committee. Even if the consultation takes place subsequently if the committee approves of the action of the Administrative Judge, then the original action would be valid and effective with effect from its own date.

In this view, the communication of the Court's opinion on the 8th July, 1968 would be valid.

Even if it be assumed that the communication of 8th July, 1968 did not satisfy the requirements of law, still the petitioners have not made out a case for interference. It has been seen that the Administrative Committee took the decision on the 28th August, 1968. By then the Governor had considered the opinion of the Court as sent to it on the 8th July, 1968. The Governor sent the order of compulsory retirement to the High Court. The High Court transmitted it for service on the petitioners on or about the 2nd September, 1968, much after the Administrative Committee had approved the proposal. The order was served on the petitioner on 3rd September, 1968. Thus before the order of compulsory retirement came into force on 3-9-1968, all the requisite requirements of Article 233 of Constitution had been completed. In this situation, rule 21 would come in to play and would cure whatever irregularity took place in following the procedure laid down in Chapter III of the Rules of the Court. The impugned order cannot be held to have violated Article 233 of the Constitution."

12. We do not approve of the above opinions of the learned Judges of the High Court.

13. Now, it is settled by the decision of this Court in *State of Uttar Pradesh x. Batuk Deo Patil Tripathi* (1978



Ali LJ 477) (supra) that on a true construction of the rules of business of the Allahabad High Court it was opened to the Administrative Committee to recommend to the Governor to pass an order of compulsory retirement in respect of a District Judge or a subordinate judicial officer. We need not, therefore, go into the question whether the Full Court alone should have considered the case of the appellant before such recommendation was made. In the instant case as we have already stated above, the Administrative Committee came to know of the order of premature retirement already passed by the Governor only after it had been passed on the basis of the opinion expressed previously by the Administrative Judge. The Rules of Business in Chapter 111 of the Rules of Court, 1952 referred to above show the powers which are exercisable by the Full Court, the Chief Justice, Judge in the Administration (Administrative Judge) and the Administrative Committee of the High Court, Rule 3 of Chapter 111 of the Rules lays down that all executive and administrative business and all business in the Administrative Department requiring orders shall be submitted by the Registrar to the Chief Justice or the Administrative Department, as the case may be, together with this comments thereon, if any be subject to these Rules disposed of by that Judge. Rule 4 provides that the Judge in the Administrative Department shall before passing final order, cause to be circulated for the information of the Judges of the Administrative Committee then present in Allahabad his reco-

mmendations as to the appointment, promotion or suspension of judicial officers, and that should any Judge dissent from such recommendations, he shall signify his dissent and his reasons therefor in writing. Rule 5 provides that in regard to the matters set out thereunder the Judge in the Administrative Department shall consult the Administrative Committee either by circulating the papers connected with the matter with his own opinion or recommendation thereon to the members of the Committee then present in Allahabad or by laying it before a meeting of the Administrative Committee and one of the items mentioned in clause (c) of rule 5 (1) of the Rules is 'all matters of importance upon which the Government desires the opinion of the Court. In the instant case the Government had sought the opinion of the High Court regarding the question whether the appellant could be prematurely retired and that question was certainly a very important matter from the point of the subordinate judicial. The Administrative Judge before giving his opinion in support of the view expressed by the Government should have either circulated the letter received from the Government had sought the members of the Administrative Committee or placed it before them at a meeting. He did not adopt either of the two courses. But he on his own forwarded his opinion to the Government stating that the appellant could be prematurely retired. That he could not do. Ordinarily, it is for the High Court, on the basis of assessment of performance and



all other aspects germane the matter to come to the conclusion whether any particular (judicial officer under its control is to be prematurely retired and once the High Court comes to the conclusion that there should be such retirement, the Court recommends to the Governor to do so. The conclusion is to be of the High Court since the control vests therein. Under the Rules obtaining in the Allahabad High Court, the Administrative Committee could act for and on behalf of the Court but the Administrative Judge could not have. Therefore, his agreeing with the Government proposal was of no consequences and did not amount to satisfaction of the requirement of Article 235 of the Constitution. It was only after the Governor passed the order on the basis of such recommendation, the matter was placed before the Administrative Committee before the order of retirement was actually served on the appellant. The Administrative Committee may not have dissented from the order of the Governor the opinion expressed by the Administrative Judge earlier. But it is not known what the Administrative Committee would have done if the matter had come up before it before the Governor had passed the order of premature retirement. In any event the deviation in this case is not a mere irregularity which can be cured by the ex post facto approval given by the Administrative Committee to the action of the Governor after the order of premature retirement had been passed. The error com-

mitted in this case amounts to an incurable defect amounting to an illegality. We may add that while it may open the Government to bring to the notice of the High Court all material having a bearing on the conduct of District Judge or subordinate judicial officer, which may be in its possession the Government cannot take the initiative to retire prematurely a District Judge or a subordinate judicial officer. Such initiative should rest with the High Court.

14. Under the circumstances, it has to be held that the impugned order of premature retirement passed by the Governor without having before him the recommendation of the Administrative Committee or of the Full Court is void and ineffective. We, therefore, set aside the judgment of the High Court and quash the order of premature retirement passed in respect of the appellant. He shall be treated as having been in service until the expiry of 31-3-1971 when he would have retired from service on attaining 58 year of age.

15. We are informed that the appellant has died on 27-11-1983 and his legal representatives have been brought on record. The arrears of salary, pension etc. payable to the appellant on the above basis till 27-11-1983 shall, therefore, be paid to the legal representatives of the appellant within four months from today. This appeal is accordingly. The legal representatives of the appellant are also entitled to the costs in both the Courts.

Appeal allowed.



**R. B. Misra**  
**Judge**  
**Supreme Court of India**

### OBSERVATION

(A) **Compulsory retirement—Includes premature retirement—Haryana service of Engineers—Age of superannuation—Not reduced to 50 years by virtue of sub-clause (i) of R. 3.26 (c) (Constitution of India, Art 311—Punjab Civil Services Rules, Vol. I Part I. R. 3.26 (c) (1) (as applicable to Haryana).**

(B) **Compulsory retirement by giving 3 months' notice—R. 3.26 (d) is not applicable to P.W.D. Engineer—Cl. (d) is supplemental to cl. (a) of Rs. 3.26; AIR 1960 SC 247, Rel. on Punjab Civil Services Rules, Vol. I Part I R. 3.26 (d) as applicable to Haryana)—Applicability.**

(C) **Protection from premature retirement—Under Sub Cl. (1) of Rr. 3.26 (c) of Punjab Civil Services Rules, Vol. I Part I. R. 3.26 (c) as applicable to Haryana—It is a special rule applicable to Engineers and overrides the general R—3.26 as stood prior to 1980 also gave complete immunity to Supdt. Engr. from premature retirement. (Constitution of India, Art. 311) Order of P & H High Court D/- 5-1-1984 Reserved. Punjab Civil Services Rules, Vol. I Part I R. 3.26 (c).**

### OBSERVED BY

Mr. E. S. Venkataramiah and Mr. R. B. Misra  
 Hon'ble Judges, Supreme Court of India

### IN

Civil Appeal No. 4953 of 1985 decided on 4-11-1985 in the case of S. C. Jain Appellant v. State of Haryana and another, Respondents.

### TEXT

Misra, J.:—Special leave granted.

2. This appeal by special leave is directed against the order of the High Court Punjab and Haryana dated 5th January 1984 dismissing the writ petition in a service matter.

3. The appellant joined service as a Sub-divisional Officer (Assistant Engineer) in Class II on 28th August 1953 in the former State of Pepsu. On 1st November 1956 the State of Pepsu and

Punjab were merged and the appellant was integrated in the service of the recognised State of Punjab. He worked on this post for about eight years and during this period he was posted at various places in the State and was assigned different kinds of duties. The authorities being satisfied with his preformance, he was promoted to the post of Executive Engineer in Class I Gazetted on 24th May, 1961. He was allowed to cross the efficiency bar immediately when



it became due. On this post he worked for about ten years. Considering the efficiency and suitability of the appellant he was confirmed on the post of Executive Engineer in class I Gazetted on 1st April, 1965.

4. On 1st November 1966 the State of Punjab was bifurcated into the State of Punjab and the State of Haryana. On the reorganisation of the State of Punjab the petitioner came to be allocated to the service of the State of Haryana. In the new State also his performance was excellent and the authorities satisfied with his meritorious services gave him a selection grade of the post of Executive Engineer. The admission of the appellant to the selection grade itself is indication of the fact that the authorities were satisfied with his work honesty, integrity and his capability. In due course the appellant was also promoted to the post of Superintending Engineer on 9th February, 1970. He had hardly worked for about a month when he was reverted but not because of any complaint against him or his inefficiency but because one of the posts of Superintending Engineers was reduced by the Government. The appellant being junior-most was reverted. But when the post of a Superintending Engineer again fell vacant the State of Haryana promoted the appellant to the said post promptly on 27th May 1971. On account of his meritorious service he was found fit to be posted first as additional Director of Technical Education Haryana for about four years and

thereafter as director P.W.D. (B & R) Research Laboratory at Nilokheri. The work of the P. W. D. Laboratory was highly specialised and skilled and required care, precision and accuracy and only officers of the merit and proved ability, competence and having research aptitude are posted there. The appellant was considered to be the most appropriate officer for the post.

5. The appellant by a letter dated 19th October, 1981 was offered the post of Superintending Engineer on deputation to the Delhi Development Authority. This offer was made to the appellant in view of the request from the Delhi Development Authority for names of suitable officers. Again on 11th December 1981 the appellant received a telegram from the office of the Engineer-in-Chief seeking the willingness of the appellant for nomination for the post of Civil Engineer for an assignment with the Government of Libya. Shortly thereafter the appellant received another offer from the office of the Engineer-in-Chief, Haryana P. W. D. (B & R) Chandigarh on 15th December, 1981. This offer was pursuant to the request of the management of Dayanand University, Rohtak asking for names of Superintending Engineer for the post of Chief Engineer. This offer was made only to the Superintending Engineers who were considered competent by the Engineer-in-Chief, Haryana P. W. D. (B & R), Chandigarh.

6. The sequence of events and the promotion of the appellant to higher



and higher posts in quick succession speak for themselves and they unmistakably indicate that the authorities were satisfied with his work and integrity. So far all was well with him.

7. It appears that on 15th December, 1981 the appellant applied for casual leave for four days from 21st to 24th December, 1981 and the station leave from 19th to 27th December which was sanctioned by the office of the Chief Engineer on 17th December 1981. When he was availing the leave he received a telegram intimating that the casual leave and station leave have been cancelled. Neither the telegram nor the confirmatory letter dated 21st December, 1981 received subsequently disclosed the reason for the cancellation of leave. The appellant, therefore, had to join and resume his duties as per instructions in the said telegram. The appellant received the impugned order No. 11/3-BR (Estt)-6-81, dated 18th December, 1981 from the Government on 29th December, 1981 prematurely retiring him from service after attaining the age of 50 years. The impugned order of premature retirement dated 18th December, 1981 is in the following terms :

“Whereas the Governor of Haryana is of the opinion that it is in the public interest to retire Shri S. C. Jain, Superintending Engineer, Haryana P. W. D. (B & R Branch) from service after attaining the age of 50 years.

Now, therefore, in pursuance of the provisions contained in rule 5.32

(c) of the Punjab Civil Services Rules Vol. II, Part II and rule 3.26 (d) of the Punjab Civil Services Rules Vol. I, as applicable to the State of Haryana, the Governor of Haryana in the public interest hereby orders the payment of three months' pay and allowances in lieu of notice to Shri S. C. Jain, Superintending Engineer and retires him from Haryana Government Services with effect from the date of receipt of this order.

By Order of the Governor  
 Sd/- Commissioner & Secretary  
 to Govt. Haryana PWD B & R Branch”

8. The appellant made several representations against the order of premature retirement on 25th January, 1982, 26th April, 1982, 25th July 1982 to the respondents with copies forwarded to the Chief Minister of Haryana, Minister for PWD, Haryana and the Engineer-in-Chief PWD. B & R Branch, Haryana. The appellant, however, did not receive any reply despite repeated reminders. The appellant also separately submitted representation to the Chief Minister, Haryana in January 1982. The same forwarded to the then Minister for P W D (B & R), Kanwar Ram Pal Singh for examining the representation in detail, who after examining the position made the following remarks on the representation itself :

“Recommended strongly restoring him to his original post.

Sd/— Ram Pal Singh  
 PWM 25th April 1982”



Despite the recommendation of the P. W. D. Minister the appellant got no relief. Under the circumstances he was constrained to take recourse to court of law and he challenged the impugned order of premature retirement by filing a writ petition in the High Court of Punjab and Haryana on grounds inter alia that in view of the clear provisions contained in rule 3.26 (c) of Punjab Civil Services Rules Vol. I, part I (as applicable to Haryana), which are special rules applicable to the Public works Department Officers, the general rule contained in rule 3.26 (d) empowering the Government to compulsorily retire a public servant has no application to the present case. Curiously enough the High Court dismissed the writ petition in limine by a cryptic order :

“No merit. Dismissed” The appellant has now approached this Court by special leave. He has taken all those ground taken by him in the writ petition.

9. Dr. Y. S. Chitale appearing for the appellant forcefully urged that in view of the provisions of rule 3.26 (c) of the Punjab Civil Services Rules, Vol. I, part I, the appellant could not be retired prematurely. We heard the counsel for the parties on this point first and indicated that if the first contention of Dr. Chitale was not accepted we would hear the counsel for the parties on other points involved in the case. Having heard the counsel for the parties at some length we

are of the view that the first point raised by Dr. Chitale is formidable and the appeal must succeed on this point alone. It is, therefore, not necessary to hear the parties on other points involved in the case.

10. In order to appreciate the contention of Dr. Chitale it will be pertinent to quote rules 3.26 (d) of the Punjab Civil Services Rules, Vol. I, Part I applicable to the present case (1980 Print) :

“Compulsory retirement.

3.26 (a) Except as otherwise provided in other clauses of this rule, every Government employee shall retire from service on the afternoon of the last day of the month in which he attains the age of fifty-eight years. He must not be retained in service after age of compulsory retirement, except in exceptional circumstances with the sanction of the competent authority in public interest, which must be recorded in writing :

Provided that the age of compulsory retirement of class IV Government employee shall be sixty years :

Provided further that a Government employee whose date of birth is the first of a month shall retire from service on the afternoon of the last day of the preceding month attaining the age of fifty-eight or sixty years as the case may be.

(b) .....

(c) The following are special rules applicable to P. W. D. Officers :—



(1) Except as otherwise provided in this sub-clause, Government employees in the Haryana Service of Engineers Class I (B & R, LB. and Electricity) must retire on reaching the age of 58 years, and may be required by the competent authority to retire on reaching the age of 50 years if they have not attained the rank of Superintending Engineer.

(2) Subject to the requirements of this sub-clause as to re-appointment, the competent authority may, in special circumstances, which should be recorded in writing, grant an extension of service, not exceeding three months, to a Chief Engineer.

(3) No Chief Engineer shall, without re-appointment, hold the post for more than five years, but re-appointment to the posts may be made as often, and in each case for such period not exceeding five years as the competent authority may decide. Provided that the term of re-appointment shall not extend more than three month beyond the date on which the Government employee attains the age of 58.

(d) The appointing authority shall, if it is of the opinion that it is in the public interest so to do, have the absolute right to retire any Government employee, other than Class IV Government employee by giving him notice of not less than three months in writing or three months' pay and allowances in lieu of such notice :—

(i) if he is in class I or class II service or post and had entered Government service, before attaining the age of thirty-five years, after he has attained the age of fifty years, and

(ii) (a) if he is in class III service or post, or

(b) if he is in class I or class II service or post and entered Government service after attaining the age of thirty-five years;

after he has attained the age of fifty-five years.

The Government employee would stand retired immediately on payment of three months' pay, and allowances in lieu of the notice period and will not be in service thereafter."

11. Rule 3. 26(c), which is a special rule applicable to Government employee in the Haryana Service of Engineers Class I, will govern the case of the appellant as the special overrides the general. Admittedly he was working as the Superintending Engineer for the last so many years on the date when the impugned order of his premature retirement was passed by the Governor. This Rule provides an immunity to the engineer who has attained the rank of Superintending Engineer. The appellant, therefore, get the protection of clause (1) of rule 3. 26 (c).

12. Shri Harbans Lal appearing for the State of Haryana in reply refutes the contention raised by Dr. Chitale and



contends that the second part of Rule 3.26 (c) (1) only authorises the Secretary to Government in consultation with the Finance Department, to reduce the age of superannuation below 58 and above 50 with regard to class I officers of the PWD if they have not attained the rank of Superintending Engineers. This rule according to him is an enabling provision authorising the Secretary to Government to reduce the age of superannuation of all class I officers of the PWD if they have not attained the rank of Superintending Engineers and if they did so then all such officers who have attained 50 years should retire.

13. The contention of Shri Harbans Lal has absolutely no force for a variety of reasons :

Firstly, the heading 'Compulsory Retirement' is wide enough to include premature retirement within its fold. A Government employee in the Haryana service of Engineers has no right to continue in service if he has reached the age of superannuation which is 58 years in the case of engineers. He has perforce to retire unless he had been granted an extension. Likewise an engineer who has not reached the age of superannuation, but is made to retire prematurely his retirement is as much a compulsory retirement as that of an employee who has attained the age of superannuation. It will, in our opinion not be correct to say that the age of superannuation in case of engineers who have not attained the rank Superintending Engineers has been reduced to 50

years. His contention, if accepted would result in an absurdity. The inevitable result will be that all Executive Engineers will have to retire at the age of 50 which could never have been intended by the rule makers. The argument of the learned counsel for the State is a desperate one indeed. Shri Harbans Lal tried to bring this case within the fold rule 3.26 (d). This rule gives the appointing authority the absolute right to retire any Government employee other than class IV Government employee by giving him notice of not less than three months in writing or three months pay and allowances in lieu of such notice.

14. This rule is applicable to Government employees but not to engineers of the P.W.D. for whom there is a special rule. In our opinion it is a supplement to rule 3.26 (a) because it supplies the procedure to be adopted in case of premature retirement of other Government servants. We get support for our view from *M. Narasimhaiah v. State of Mysore* (1960) 1 SCR 981 (AIR 1960 SC 247). That case involved the interpretation of articles 297 and 298 of the Mysore Services Regulation. Article 294 provides that a Government servant in superior or inferior service who has attained the age of fifty-five years may be required to retire unless the Government considers him efficient and permits him to remain in service. But as the premature retirement of an efficient Government servant imposes a needless charge on the State this rule should be worked with discretion.

Article 297 laid down that a Govern



ment servants in superior service who has attained the age of fifty-five years may at his option retire from service on a superannuation pension. It was sought to be urged in that case that article 297 gave option to the public servant whether he retires at that age or not. This Court interpreting article 297 held that this article was complementary to article 294 (a) which gives Government the power of keeping Government servants in service beyond the age of 55 years. Article 297 allows the Government servant, if the Government wants to keep him in service after 55 years to opt for retirement. It does not mean that it is entirely at the option of the Government servant to continue beyond the age of 55 years and the Government cannot retire him at that age if he does not exercise the option.

15. That decision involved the interpretation of different rules but the reasoning adopted in that case is applicable in the construction of rule 3. 26 (b) of the Punjab Civil Services Rules.

Shri Harbans Lal in support of his contention referred to the old corresponding rules. The relevant portion of the old rules is quoted hereunder :

“Rule 3-26 of C. S. R. (Pb) 1941 Edition Compulsory Retirement.

3. 26 (a) Except as otherwise provided in the other clauses of this rule the date of compulsory retirement of a Government servant, is the date on which he attains the age of 55 years. He may be retained in service after the

date of compulsory retirement with the sanction of competent authority on public grounds, which must be recorded in writing, but he must not be retained after the age of 60 years, except in very special circumstances.

(b).....

(c) The following are special rules applicable to particular services : --

(i).....

(ii) Except as otherwise provided in this sub-clause Civil Engineers of the Public Works Department must retire on reaching.

Rule 3.26 of Punjab C. S. R. Vol. I part I, 1953 Edition. Compulsory Retirement.

3.26 (a) Except as provided in other clauses of this rule, the date of compulsory retirement of a Government servant other than a Class IV Government servant, is the date on which he attains the age of 55 years. He must not be retained in service after the age of compulsory retirement, except in exceptional circumstances with the sanction of competent authority on public grounds, which must be recorded in writing.

(d).....

(c) The following are special rules applicable to P. W. D. Officers ?.....

(1) Except as otherwise provided in this sub-clause, Government servants in the Punjab Service of Engineers Class I (B & R. T. B. and Electricity) must retire on reaching the age of 55 years, and may be required by the competent authority to retire on reaching the age



of 50 years, if they have not attained the rank of Superintending Engineer.

Rule 3.26 of Punjab Civil Services Rule, Volume I, Part I, 1963 Edition. Compulsory Retirement.

3.26 (a), Except as provided in other clauses of this rule, the date of compulsory retirement of a Government servant other than a Class IV Government servant, is the date on which he attains the age of 58 years. He must not be retained in service after the age of compulsory retirement, except in exceptional circumstances with the sanction of competent authority on public grounds, which must be recorded in writing.

(b).....

(c) The following are special rules applicable to P. W. D. Officers : -

(1) Except as otherwise provided in this sub-clause, Government servants in the Punjab Service of Engineers, Class I (B & R, I B. and Electricity) must retire on reaching the age of 58 years, and may be required by the competent authority to retire on reaching the age 50 years if they have not attained the rank of Superintending Engineer.

Clause (b) inserted in rule 3.26 vide Notification No. 4118-3 FR-74/24837 dated 12th July 1974.

3.26 (d). The appointing authority may, if it is of the opinion that it is in the public interest so to do, retire any Government servant, other than a Class IV Government servant, other than a Class IV Government servant, by giving him a notice of not less than three months in writing :—

(i) if he is in class I or class II service or post and had entered Government service before attaining the age of thirty-five years, after he had attained the age of fifty years, and

(ii).....

17. A bare perusal of the old rule will indicate that an engineer who has attained the rank of Superintending Engineer in the P. W. D. (B & R Branch) had always the immunity ever since the provision for premature retirement came into force. The old corresponding rules do not improve the position for the State. They rather support the contention of the appellant.

18. We enquired from Shri Harbans Lal whether any other engineer in the Engineering Service of P. W. D. who had attained the rank of Superintending Engineer had ever been prematurely retired and he frankly admitted that there has been no such case.

19. For the foregoing discussion the appeal must succeed. It is accordingly allowed with costs and the order of the High Court dated 5th January, 1984 is set aside. The writ petition stands allowed and the order of premature retirement dated 18th December, 1981 is quashed. The appellant shall be deemed to be in continuous service. He is entitled to his salary, emoluments and other consequential benefits to which he would have been entitled to if he had not been prematurely retired.

Appeal allowed.



## OBSERVATION

(A) **Employees of Andhra Pradesh Govt.—Age of superannuation reduced from 58 to 55 years—Govt. realising injustice caused, immediately reversing its decision—Ordinance restoring age of superannuation to 58 years however passed some time after—employees retiring due to reduction in superannuation age before date of passing of Ordinance excluded from benefit of extended age of superannuation under Ordinance Held, provisions of Ordinance arbitrarily classified Govt. employees—Constitution of India, Arts. 14, 16—A.P. public Employment (Regulation of Age of Superannuation) Act (23 of 1984), S. 3—A.P. Public Employment (Regulation of age of Superannuation) Second Amendment Ordinance (24 of 1984), Cl. 3 (1)—A.P. public Employment (Regulation of Age of Superannuation) Amendment. Act (3 of 1985), S.4.**

(B) **Prospective statute—Irrational classification resulting out of its prospectiveness—Court can remove arbitrariness although it may amount to making statute retrospective—Constitution of India, Arts 14, 16.**

(C) **Govt. Servant—Order to reinduct—Reinduction detrimental to public interest—Like private employees Govt. can also be ordered to pay back and future wages—Constitution of India, Art. 311.**

(D) **Res judicata—Writ petition similar to earlier one filed—Earlier petition dismissed in limine—Dismissal of earlier petition would inhibit discretion but not jurisdiction of Supreme Court to hear the subsequent writ (Obiter)—Constitution of India Art. 32—Civil P.C. (5 of 1908), S. 11.**

(E) **Necessary Parties—Writ petition by Govt. employees challenging Ordinance issued by Govt.—Relief claimed against Govt. and not against individuals—Failure to implead all affected employees would not make petition unmaintainable (Obiter). (Civil P.C. (5 of 1908), O. 1, R. 10)—Constitution of India, Article 32.**

## OBSERVED BY

Mr. O. Chinnappa Reddy, Mr. V. Balakrishna Eradi and Mr. V. Khalid  
 Hon'ble Judges, Supreme Court of India.

## IN

Writ Petns. 5447-5546; 5547-5574; 5586-5562 etc. of 1985 and SLP (C) No. 8990, 9099 and 9110 of 1985 and C.M.P. Nos. 24003 and 24003A of 1985 (In W.P. No. 5154 1985) and C.A. No. 2508 of 1985, decided on 19-8-1985 in the case of Prabhakar Rao and others, etc., Petitioners v. State of Andhra Pradesh and others etc. Respondents.



### TEXT

Chinnappa Reddy, J. :—Tossed about by the Executive, the Legislature and, we are sorry to say, by us (the Judiciary) too, and therefore, totally bewildered, several, civil servants, employees of public sector corporations and teachers working under various local authorities are now before us wanting to know where they stand and to what justice and relief they are entitled. In Feb., 1983, the Government of Andhra Pradesh decided to reduce the age of superannuation of its employees from 58 to 55 years. The Government also issued directives to local authorities and public corporations under its control to do likewise. The age of superannuation was in fact 55 years to begin with. But, earlier, in the year 1979, the Government of Andhra Pradesh had raised the age of superannuation to 58 years, presumably, because of the increased average human longevity in India, the better health and medical facilities available, the improved standard of living, the usefulness in service of experienced employees, the employment situation and potential, and such other relevant considerations. But in February 1983, the Government decided to reduce the age of superannuation. In order to give effect to their policy of reversal, i. e. the policy of reducing the age of superannuation from 58 to 55, the Government amended Rs. 56. (a) of the Fundamental Rules and R. 231 of the Hyderabad Civil Services Rules by substituting the figure '55' for the figure '58' and by making a special provision that those who had already attained the

age of 55 years and were continuing service beyond that age on 8-2-1980 shall retire from service on the afternoon of 28-2-1983. The notifications by which these amendments were carried out were followed by another notification dated 17-2-1983 deleting the proviso to Rule 18 of the Fundamental Rules which protected a civil servant against a change of his conditions of service to his detriment after he entered service. This was followed by the promulgation of the Andhra Pradesh Ordinance No. 5 of 1983 regulating the recruitment and conditions of service of persons appointed to public service and posts in connection with the affairs of the State of Andhra Pradesh and the officers and servants of the High Court of Andhra Pradesh. Clause 10 of the Ordinance provided that 'every Government employee, not being a workman and not belonging to Last Grade Service shall retire from service in the afternoon of the last day of the month in which he attains the age of fifty-five years.' In the case of Government employees belonging to the Last Grade Service, it was provided that they shall retire from service on the afternoon of the last day of the month in which they attain the age of sixty-years. Clause 18 (1) provided that the proviso to R. 2 of the Fundamental Rules shall be and shall be deemed always to have been omitted. Not immediately after the notifications reducing the age of superannuation from 58 to 55 were issued, a large number of Government employees, employees of public sector corporations and teachers



working under various authorities local filed writ petitions in this Court as well as in the High Court of Andhra Pradesh challenging the vires of the provisions reducing the age of superannuation. After promulgation of the ordinance, they were permitted to amend the petitions to question the appropriate provisions of the ordinance too. The petitions in this Court were heard at great length for several days by Chandrachud, C.J., Pathak, J. and S. Mukharji, J. and judgment was reserved on 27-7-83. The judgment was however pronounced only on January 18, 1985. The impugned provisions were up held and all the writ petitions were dismissed. In the meanwhile much water had flown under the bridge. There were agitations and agreements. There were twists and turns of political power. There were amendments to the legislation, once more raising the age of superannuation. Learned counsel inform us that the subsequent events were brought to the notice of the court and that a petition was also filed to amend the writ petitions and to raise additional grounds. The Court however refused to take notice of the subsequent events and proceeded to pronounce their judgment with reference to a situation which obtained several months ago and which situation stood considerably altered and even become unreal by the subsequent March of events. It was a great pity. Much confusion and heart-burring might have been avoided, as we shall presently see.

2. It is now necessary to mention in greater detail the events that followed

the reduction of the superannuation from 58 to 55 years. We referred to agitations and agreements. It appears that soon after the reduction of the age of superannuation, there was a State-wide agitation by affected employees and on August 3, 1983, an agreement was arrived at between the Government of Andhra Pradesh and the Action Committee of Employees and Workers in Andhra Pradesh.

3. Clause (1) of the Agreement is important and may be usefully extracted. It is as follows :

“All provisions relating to Ordinance 5 of 1983, except those relating to the age of superannuation, will be deleted at an early date. Proviso to F. R. 2 will be restored in respect of all matters, except the age of superannuation retrospectively. The provisions of the ordinance relating to the age of superannuation will also be removed after the judgment of the Supreme Court, provided that such removal will not adversely affect the right of Government as determined by the Supreme Court judgment to fix the age of superannuation.

If the Supreme Court upholds the power of the Government to reduce the age of superannuation without referring to the provisions in the ordinance and F. R. 2., the entire ordinance will be scrapped and F. R. 5 will be restored.”

This clause of the Agreement shows that while the Government was anxious to obtain a judgment of the Supreme Court securing their right to ‘fix the age



of superannuation' they had also realised that grave wrong and injustice had been done to its employees by their earlier action in reducing the age of superannuation. They were anxious to undo the wrong and do justice to their employees, while preserving their own power to act in the future, if and when necessary. The apparently was the reason why the Government agreed to scrap the whole of the ordinance if the Supreme Court upheld the power of the Government to reduce the age of superannuation and further agreed to delete provision relating to the age of superannuation in the ordinance, after the judgment of the Supreme Court was pronounced. Cl. (1) of the Agreement expressly provides that proviso to F. R. 2 will be restored in respect of all matters, except the age of superannuation retrospectively. It is then followed by the sentence: The provisions of the ordinance relating to the age of superannuation will also be removed after the judgment of the Supreme Court'. The clear implication appears to be that the provisions of the ordinance relating to the age of superannuation will also be removed in the same manner as the proviso to Fundamental Rule 2 i.e. retrospectively. Otherwise the agreement would make no sense. Those attaining the age of 55 years before judgment was pronounced would just have to walk out while those who did not would stay on. Surely their fate was not to hang on a date.

4. The agreement, however, contained a further curious stipulation that it

was not to be placed before the Supreme Court either by the Government or by the employees. Perhaps the stipulation was intended to prevent the Supreme Court from abstaining from pronouncing upon the power of the Government to reduce the age of superannuation. Quite obviously the Agreement contemplated that the judgment of the Supreme Court would be forthcoming very soon. But that was not to be.

5. There was considerable discussion at the Bar whether the agreement contemplated and stipulated restoration of 58 years as the age of superannuation if the power of to the Government reduce the age of superannuation was upheld by the Supreme Court. The agreement appears to us to be clear and categorical and a reference to the pleadings demonstrates that the Government also never doubted the employees' interpretation of the agreement. In para 2 (h) of the petition No. 3420-26 of 1985, the petitioners asserted:

"It is pertinent to point out that in the interregnum between the writ Petition being admitted in this Hon'ble Court and the judgment being delivered a State-wide agitation took place in Andhra Pradesh State Government in June and July, 1983. The agitation was for the purpose of demanding inter alia that the retirement age of the State Government employees be restored to 58 years. Ultimately, on 3-8-1983, an agreement was arrived at between the State Government and the Action Committee of the Employees and workers in



Andhra Pradesh by which it was agreed that the State Government would restore the age of retirement to 58 years if the Supreme Court upheld the State Government's power to reduce the age of retirement. The said agreement which was a detailed agreement entered into between State of A.P. on behalf of whom the negotiations were conducted by the then Chief Secretary Shri G. V. Ramkrishna I.A.S. and the Action Committee of the employees and workers, which Action Committee represented 39 service organisation."

To this the answer of the Government in their counter was :

"I state with respect to paragraph 2 that this paragraph deals with narration of facts regarding the circumstance under which the age of retirement was enhanced and the recommendations of the Pay Revision Commission etc. Hence they require no comments. It is respectfully submitted that all these relevant facts have been taken into consideration by the Supreme Court while rendering the judgment upholding G. O. Ms. 36, dt. 8-2-1983. In its judgment since reported in (1985) 1 SCC 523 : (AIR 1985 SC 551). Hence there is no necessity to traverse those facts once again herein," and

"I further state that it is not proper for the petitioner to have filed the agreement reached between the employees Union and the state of Andhra Pradesh as Annexure to the writ petition. Under the last clause of the agreement reached

between the Employees Union and the State of Andhra Pradesh that the agreement shall not be placed before the Supreme Court by the Government or the members of the employees associations. Contrary to the provisions of the agreement the petitioners have chosen to file this agreement in support of their case and pleaded for enhancement of the age of retirement."

The Government's objection was not to the interpretation placed upon the agreement by the parties but to its being brought to the notice of the Court.

6. The Andhra Pradesh Legislature enacted the Andhra Pradesh Public Employment (Regulation of Age of Superannuation) Act No. 23 of 1984 making it applicable to all persons appointed to public services and posts in connection with the affairs of the State all officers and other employees working in any local authority, whose salaries and allowances were paid out of the Consolidated Fund of the State, all persons appointed to the Secretariat Staff of the Houses of the State Legislature ; and all officers or employees whose conditions of service were regulated by rules framed under the proviso to Art. 309 of the Constitution immediately before the commencement of this Act Sub-section (3) of S 1 stated clause (i) of S. 7 shall be deemed to have come into force on the April 29, 1983. Section's 3 (1) and (2) were as follows :

"3 (1). Every Government employee, not being a workman and not be-



longing to Last Grade Service shall retire from service on the afternoon of the last day of the month in which he attains the age of fifty-five years.

(2) Every Government employee not being a workman but belonging to the Last Grade Service shall retire from service on the afternoon of the last day of the month in which he attains the age of sixty years."

Explanation II (b) to S. 3 was to the following effect :

(b) A Government employee who attained the age of superannuation, but who was allowed to continue to hold the post beyond the date by virtue of stay order of a Court, shall be deemed to have ceased to hold the post and relieved of his charge from the date of the judgment dismissing his petition, irrespective of whether the charge of the post was handed over or not as prescribed in any rule or order of the Government for the time being in force."

On August 23, 1984 the Andhra Pradesh Public Employment (Regulation of Age of Superannuation) Act No. 23 of 1984 was amended by the promulgation of Andhra Pradesh Ordinance No. 24 of 1984 providing that in S. 3 (1) of the Act and in Explanation II (a), the words 'fifty-eight years' shall be substituted for the words 'fifty-five years.' This was obviously done to give effect to the agreement of August 3, 1983 and to fulfil the promise held out there-

in that age of superannuation would be restored to 58 years. Clause 3 (1) of the Ordinance is the much disputed provision and it has therefore, to be extracted in full. It is as follows :

"3 The provisions of this Ordinance shall not apply to persons who attained the age of superannuation in pursuance of the notifications issued to G. O. Ms. No. 36 Finance and Planning (Finance Wing—F.R.I.) Department, dated the 8th February, 1983, or in pursuance of the provisions of the Andhra Pradesh public Employment (Regulation of Age of Superannuation) Act, 1984, as in force prior to the commencement of this Ordinance."

Andhra Pradesh Ordinance No. 24 of 1984 was replaced by Act No. 23 of 1985. By S 2 of the Amending Act the words 'fifty-five years' were substituted by the words 'fifty-eight years' in S. 3 (1) and Explanation II (a) of the principal Act. Section 4 of the Amending Act which is more or less on the same lines as Cl. 3 (1) of the Ordinance says :

"3 (1) The provisions of S. 2 of this Act shall not apply to persons who attained the age of superannuation in pursuance of the notifications issued to G.O. Ms. No. 36. Finance and Planning (Finance-Wing-F. R. I.) Department dated the 8th February, 1983, or in pursuance of the provisions of Andhra Pradesh Public Employment (Regulation of age of Superannuation) Act, 1984, as in force prior to the commencement



of this Act.”

7. No. explanatory statement accompanying Ordinance No. 23 of 1984 was brought to our notice. The Statement of Objects and Reasons of Act No. 3 of 1985 was however placed before us but it is not helpful to ascertain the reasons which led the legislature to restore the age of superannuation to 58 years. It merely states that the Government considered it necessary to raise the age of superannuation from 55 to 58 years.” But we are not altogether helpless. Where internal aids are not forthcoming, we can always have recourse to external aids to discover the object of the legislation. External aids are not ruled out. This now a well settled principle of modern statutory construction. Thus ‘Enacting History’ is relevant. “The enacting history of an Act is the surrounding corpus of public knowledge relative to its introduction into Parliament as a Bill, and subsequent progress through, and ultimate passing by, Parliament. In particular it is the extrinsic material assumed to be within the contemplation of Parliament when it passed the Act” Again “In the period immediately following its enactment, the history of how an enactment is understood forms part of the contemporanea expositio, and may be held to throw light on the legislative intention. The later history may, under the doctrine that an Act is always speaking, indicate how the enactment is regarded in the light of development from time to time.” “Official statements

by the government department administering an Act, or by any other authority concerned with the Act, may be taken into account as persuasive authority on the meaning of its provisions.” Justice may be blind but it is not to be deaf.

Judges are not to sit in sound-proof rooms

8. Committee reports, Parliamentary debates, policy statements and public utterances of official spokesmen are of relevance in statutory interpretation. But ‘the comity, the courtesy and respect that ought to prevail between the two prime organs of the State, the legislature and the judiciary’, require the courts to make skilled evaluation of the extra-textual material placed before it and exclude the essentially unreliable. “Nevertheless the court, as master of its own procedure, retains a residuary right to admit them where, in rare cases, the need to carry out legislator’s intention appears to the court so require.” No rule prevents the court from inspecting in private whatever materials it thinks fit to ensure that it is well informed, whether in relation to the case before it or generally. Where these materials constitute publicly available enacting history, the court takes judicial notice them.” “The court has an inherent power to inspect any material brought before it.” (Francis Bennign: Statutory Interpretation.) This is to enable the court to determine



whether the material is relevant to the point of construction in question, and if so whether it should be admitted. This has to be done with a degree of inhibition and an amount of circumspection.

9. Here, the facts speak for themselves. *Res ipsa loquitur*. The history and the succession of events, the initial lowering of the age of the superannuation, the agitation consequent upon it and the agreement that followed the agitation clearly indicate that the object of Ordinance No. 23 of 1984 and Act No. 3 of 1985 was to undo the mischief or the harm that had been done by the lowering of the age of superannuation from 58 years to 55 years and to restore the previous position. Quite obviously, it was not a case of change of policy consequent on change of social circumstances. It was a case of a change of policy to set right immediately a recent wrong perpetrated by a well intentioned but perhaps ill thought measure. It was at all a case of reversal of policy because of changed circumstances. A reference to the note file which was made available to us by the learned Advocate General of Andhra Pradesh at our instance shows that it was after a careful consideration of the representations made by the various service associations in regard to the restoration of the age of superannuation to 58 years that the Government resolved to restore the age of superannuation to 58 years. In the counter, the Government appeared to take the stand that the Governments of the States of Karna-

taka and Rajasthan had raised the age of superannuation to 58 years and the Government of Andhra Pradesh wanted to fall in line. It was a wolly inaccurate statement. There is no reference in the note file or elsewhere, except for the first time in the counter, to the circumstance that two other State Governments had raised the age of superannuation and the Andhra Pradesh Government had accepted their wisdom. The statement in the counter must be ignored. A reference to the pleadings is revealing, if not starting. In Writ Petitions Nos. 3420/3427/85 in paragraph 5, the petitioner averred :

“In fact Shri N.T. Rama Rao, Chief Minister himself admitted that he was Misguided and Misled by the then Finance Minister and the Chief Secretary when his Government took the decision to reduce the age of retirement. His press conference dated 25-9-1984 was reported in the “Deccan Chronicle” as follows:

“Chief Minister N.T. Rama Rao today announced that his government would retain the age of superannuation of the Government employees at 58 years as decided by the short-lived Bhas-kara Rao Ministry.

Briefing newsmen after the cabinet meeting this afternoon, Mr. Rama Rao said the Cabinet had reviewed the decision of the previous Government to raise the age of superannuation from 55 years to 58 with effect from August 23, 1984.



The Chief Minister charged that Mr. N. Bhaskara Rao, the then Finance Minister and the then Chief Secretary Mr. B. N. Raman had misled him when his Government decided to reduce the age of superannuation from 58 to 55. Both have not raised any objection to the proposal. Despite knowing well that the 'unpopular' move would be detrimental to the Government, they had allowed it go with the evil intention of discrediting him, he alleged.

Mr. Rama Rao said it was not his intention to hurt the interests of any section of the people and the Government employees constituting a sizeable number who had voted his party to power. "However, it is not possible for the Government to concede the request of those who had already retired", he observed."

The said report has never been denied or resiled by the Chief Minister.

In answer, the averment was not denied. The deponent of the counter affidavit stated :

"I state with respect to paragraph 5 that it is not open to the petitioner to rely on paper cuttings in support of their contention unless otherwise they are proved apart from the fact that the statement in paper cuttings are in no way advance the case of the petitioner."

This can hardly be considered to be a denial of what was said in paragraph 5

of the petition. We must therefore, proceed on the basis that the Chief Minister (Shri N. T. Rama Rao) did allege that when the Government took the decision to reduce the age of superannuation, he was 'misguided and misled' by his Finance Minister and the Chief Secretary. It may be a sorry confession to make on the part of a Chief Minister, especially when it was a momentous decision involving the lives and future of thousands of employees. One wonders how a decision concerning the lives and the future of civil servants, who all their lives in the past, had loyally served the Government, could have been taken in such a hasty and haphazard fashion. One would expect such a decision to be taken after a full investigation into the multitudinous pros and cons, after collection of all pertinent data and after deep consideration of every aspect of the question. But there we have a statement attributed to the Chief Minister that he was "misled and misguided by the Finance Minister and his Chief Secretary. Sorry confession, it may be, but a frank and courageous admission it was, exposing him to criticism and (illegible) ridicule. It does require a sturdy spirit to own a mistake".

10. During the pendency of the Writ Petition in this Court, several employees of local authorities etc. obtained orders of stay from the High Court and were continuing in service on the dates when the judgment of the Supreme Court was pronounced. After the pronouncement of the judgment of the Supreme



Court, the authorities that be have sought to give effect to the provisions of the Act and the Ordinance by seeking to throw them out on the ground that they had completed 55 years of age during the interregnum between February 28, 1983 and August 23, 1984. Some others who had completed 55 years, between February 28, 1983 and August 23, 1984 but who had not completed 58 years sought re-entry notwithstanding the raising of the age of superannuation from 55 years to 58 years. Their re-entry was sought to be resisted on the basis of Cl. 3 (1) of the Ordinance and S. 4 (1) of the Amending Act. Those employees who were sought to be removed from service or who were denied re-entry into service on the ground that they had attained the age of 55 years between February 28, 1983, and August 23, 1984 have once again invoked the jurisdiction of this Court and sought appropriate writs from this Court to continue or to reinstate and continue them in service until they attain the age of 58 years. They are the petitioners in Writ Nos. 3203, 3413-3419, 3420-3426 etc. of 1985. They sought interim orders from this Court.

11. On 23-4-85 interim directions to the following effect were issued by Desai and Khaidi, JJ :

“(1) From amongst those Government servants and servants of local and other authorities governed by the decision of Government of A. P. reduction of age of retirement from

service from 58 years to 55 years, who continued in service or continued to hold the post on April 1, 1985 for any reason including the grant of interim relief by Courts and who are removed from the post after that date shall be reinducted and put back in the post from which he/she was removed.

(2) Those Government servants and others enumerated in No. (1) here who are today in service and are likely to be removed on account of the reduction in age of superannuation notwithstanding restoration of higher age, whatever be the case, shall continue in service subject to further orders.

(3) Those Government servants and others enumerated in No (1) here who were in service prior to April 1, 1985 and who are removed from service on account of reduction in age, shall be reinducted in service, if the posts from which each one was removed is still vacant or if someone is holding a temporary charge.

(4) These directions shall be carried out and given effect to within one week from today.

(5) These directions will also cover those Government servants who are similarly situated but filed the SLPs and WPs.

(6) Government servants referred to in No. (1) will also comprehend members of State Judicial Service.”



The matter was mentioned again on two occasions for clarification and the following orders were then made by Tulzapukar, Desai and Sen, JJ. the order made on May 6, 1985 said :

“We do not see any ambiguity in Cl. 3 of the order dated 23rd April, 1985. It is directed that Cl. 3 of the order dated 23rd April, 1985 should be implemented to the extent that promotions made to the posts which are held by the officers will be made under Rule 37 by temporary appointments and the Chief Secretary and other two Senior Secretaries will examine the question as to how many such vacancies could be filled and it is further directed that from out of the petitioners one who has the longest service will be selected. The order will be carried out within two weeks from today. This is without prejudice to the vacancy clause. All these appointments will be subject to the result of these petitions.”

The order made on May 7, 1985 said :

“We do not see any ambiguity in clause 3 of the Order dated 23rd April, 1985. It is directed that clause 3 of the Order dated 23rd April, 1985 should be implemented to the extent that the posts from which the employees were moved are still vacant or where such post is held temporarily by others on promotion under Rule 37 of the A. P. State Subordinate Service Rules. The Chief Secretary and two other Senior Secretaries will examine the question as to how

many such posts could be filled and it is further directed that in cases where more than one person has retired from a post, the person having the longest service should be selected. The Order will be carried out within two weeks from today. All these appointments will be subject to the result of the petitions.”

These interim orders were made under the misapprehension that all so-called promotions could only be made under Rule 37 whereas whenever a promotion was made from a lower service to a higher service, it was not called a promotion but was styled as an appointment and was made under Rule 10. Since Rule 10 was not mentioned in the orders, persons who had been ‘promoted, and appointed under Rule 10 claimed that they could not be displaced. Some others though promoted under Rule 37 claimed that they had in fact been promoted regularly after a proper selection by the Departmental Committee but that according to the practice prevailing in Andhra Pradesh, their orders of promotion mentioned that they were promoted temporarily, though in fact they had been promoted regularly. Many such persons, claiming to have been appointed regularly. Many such persons, claiming to have been appointed under Rule 10 or claiming to have been promoted regularly notwithstanding the mention of Rule 37 filed Writ Petitions Nos. 5447-5546 of 1985 etc. questioning the orders of reversion with which they were faced consequent on the interim directions given by Desai and Khalid, JJ.



During the vacation, R. B. Misra, J. stayed the orders of reversion passed by the Government in order to reinduct the retired employees. The interim orders granted by R B. Misra, J. appeared to conflict with the earlier interim orders granted by this Court. When all the interim application came before us a few days back, we directed that all the writ petitions may be placed before us for final disposal and that is how the matters are now before us.

12. Before referring to the submissions of the parties on the principal question of discrimination and arbitrariness, it is necessary to ascertain the exact factual situation in regard to certain other matters, besides those to which we have already referred. First, in regard to the question whether the vacancies arising consequent on the application of the reduced age of superannuation have been filled and if filled, whether they have been filled on a regular or temporary basis? in Writ Petition No. 3170/ 5, a Deputy Secretary to the Government of Andhra Pradesh speaking for the Government of Andhra Pradesh swore to a counter-affidavit in May 1985 in which he stated that :

“I state with respect to paragraph 8, that it is not correct to state that only few vacancies have been filled on temporary basis on the specific condition of review and revision on the basis of outcome of the judgment in the Writ Petitions filed by the employees due to the retirement at the age of 55 years pending in this Hon'ble Court. It is

with rules on regular basis. It is only in few cases, temporary promotions have been effected pending writ petitions. It is submitted that Annexure I to this order of superannuation the Government took every step to see that most of the vacancies have been filled up in accordance with that few vacancies have been filled up. Consequent on the reduction in the age of retirement, it is submitted that it is wholly untrue to say that the counter-affidavit gives particulars regarding the vacancies that arose due to the reduction in the age of retirement on 28-2-1983 and the vacancies filled up and the vacancies existing. There are very few vacancies in the lower echelons. I also submit that the existing few vacancies are due to administrative delay or vacancies that arose later after originally filling the vacancies.”

In writ Petitions Nos. 5447-5546/85, there was a complete *valte face* and the very same Deputy Secretary speaking again for the Government of Andhra Pradesh said :

“In so far as the first point is concerned in none of the cases there were regular promotions. All the promotions were officiating/temporary/ ad hoc which would be clear from orders of promotion, some of which have been produced by the petitioners themselves. The promotions were either subject to the result of the writ petitions then pending in this. Honourable Court challenging reduction of retirement age from 50 to 55 years, or some other proceedings relating to inter se seniority pending either in this Honourable Court or in the High Court or in the admini-



Administrative Tribunal, or because of the pendency of finalisation of seniority lists and consequent review of promotions under the State Reorganisation Act further the writ petitions questioning the reduction of age of retirement from 58 to 55 in G.O. Ms. No. 36, dated 8-2-83 were heard and judgment was reserved on 27th July, 1983. Since the judgment was reserved, the judgment was expected at any moment. Hence the Government were making only officiating/temporary promotions under Rule 37. Under the circumstances it was not possible to make regular appointments / promotions. Therefore, the petitioners were rightly reverted in accordance with the directions of the Honourable Court dated 6-5-1985 and 1-5-85. There was no question of either giving them any notice or hearing before the orders of the reversion are passed, as in terms of R. 37 (dd), they could be reverted without any notice or hearing”.

“Persons holding the posts under R. 10 have no right to the posts and their appointments/promotions were purely temporary/ad hoc”.

“Hence I state that the petitioners continue to be ad hoc promotees under Rule 37 and not regular employees as claimed by them”.

and :

“Admittedly, the petitioners were promoted under Rule 37 consequent to the vacancies which arose due to the retirement of several persons at the age of 55 years.

The Government never intended to appoint them on regular basis pending writs and judgment before the Supreme Court. In case the promotions were effected regularly legal complications will set in the event of the judgment of the Supreme Court going against the State Government deliberately made R. 37 promotions so that in the event of the judgment going adversely against the State Government, there may not be any difficulty in reverting Rule 37 promotees and reinducting the employees affected by G. O. Ms. No. 36 dated 8-2-83. Fortunately, the judgment of the Supreme Court comes in favour of the State Government.”

It is amazing that the same Deputy Secretary to the Government, representing the same Government, should have sworn to two such contradictory affidavits, reveals a total sense of irresponsibility and an utter disregard for veracity. It shows that the deponent had signed the affidavits without even reading them or that he signed them to suit the defence to the particular writ petition without any regard for truth. In either case, it is reprehensible and totally unworthy of the spokesman of a Government and most unflattering to the Government on whose behalf he spoke. We would have contemplated severe action against the deponent, had we not the feeling that the responsibility for his statements lies with undisclosed higher echelons and we need not make a scapegoat of him. In fact, in a case like this involving the entire body of



Government servants in Andhra Pradesh, we would have expected the Chief Secretary or a Principal Secretary to file the counter. But they have chosen to keep themselves back.

13. However we have a duty to discover the truth. We think that the truth is what is stated in the counter-affidavit in Writ Petition Nos. 5447-55-46/85. The counter-affidavit itself gives good reasons why the promotions/appointments were made on a temporary basis and the reasons are acceptable. The statements in the counter-affidavit in Writ Petition Nos. 5447-5546/85 are supported by the findings of the Committee which was appointed by the Government under the interim orders of this Court. This Committee consisted of the Chief Secretary and two senior Secretaries and it was asked to examine the question of the availability of posts for reinduction of retired employees. The findings of Committee were mentioned in the counter-affidavit in Writ Petition Nos. 5547-5646/85 and this is what was said :

“The Committee constituted under G.O. Ms. No.205, dt. 9-5-1985 has completed its task of determining the number of vacancies for which retired employees can be reinducted as per the directions of this Honourable Court. Here below is given an abstract of the position as emerged. Total number of persons retired from 28-2-83 to 23-8-1984 due to reduction of age of retirement from 58 to 55 is 15, 529. Of these people, 8, 928 are eligible for rein-

duction as they are below 58 years. The Committee found that 2,770 posts are vacant and that 1751 persons have to be reverted as they were holding the posts on temporary promotions under Rule 10. Thus, the total number of vacancies which retired persons could be reinducted is 4, 521.”

14. It was said that it was a practice in the State of Andhra Pradesh to make even regular appointments and regular promotions under Rule 10 and Rule 37 only and therefore, the mere fact that Rule 10 or Rule 37 was mentioned in an order of appointment or promotion would not necessarily make the appointment or promotion temporary. Such appointments or promotions if made after going through the regular process or selection were to be considered as regular and not temporary notwithstanding the mention of Rule 10 or Rule 37. But here as pointed out in the counter, there was a special situation immediately after the age of superannuation was reduced, writ petitions were filed in the Supreme Court and in the High Court and there was considerable agitation by the employees. The entire situation was fluid as it were and there was good reason for the Government to make the appointments and promotions on a purely temporary basis, and that was what they did. That the Departmental Committees recommended the temporary appointments and promotions makes no difference since even temporary appointments and promotions are made on the recommendation of the Departmental Promotion Committee.



This is clear from the counter-affidavit in writ petition Nos. 5447-5546/85 where it is stated as follows in paragraph IV B :

“In certain cases, the promotions were given on the basis of the recommendations of the Departmental Promotion Committee but that does not mean that their promotions were regular. The Departmental Promotion Committee also makes recommendations for temporary appointment/promotions otherwise it will offend Arts. 14 and 16 in case all eligible-candidates are not considered for promotion even though the promotion is either officiating/temporary. Therefore, the mere selection by the Departmental Promotion Committee does not make their promotions regular Promotion or posting after completion of training does not make the promotions regular. The promotion orders of the petitioners promoted under Rule 37 clearly show that their promotions were purely temporary.”

15. It is in this setting and background of facts that we are required to consider the submissions made to us. The submission made by Sarvasi K. K. Venugopal, V.M. Tarkunde and F. S. Nariman, who appeared for the employees who attained the age of 55 years between 28-2-83 and 23-8-84, was that the classification of these persons as a separate group for the purpose of excluding them from the benefit of the redressal of the wrong done to the employees and the relief given to them by the amending Ordinance and the Act,

was an unreasonable classification having no nexus whatsoever with the object of the legislation. They urged that every person who was in Government employment on 28-2-83 was hit by the reduction of the age of superannuation from 58 to 55 years and when, it was realised that a grievous wrong had been done which it was necessary to set right by reversing the policy and such a policy decision was in fact soon taken, there was no reason to postpone effect being given to the reversal of policy to an uncertain date, namely the pronouncement of the judgment by the Supreme Court and thereby to exclude from the benefits of the change of policy that group of persons who had the misfortune of attaining the age of 55 years between the two dates. The learned counsel pointed out that the decision to reverse the policy having been taken, the uncertain date of pronouncement of judgment was an irrelevancy in fixing the date from which to give effect to the policy. In the event, the Government also did not await the pronouncement of the judgment but came forward first with the Ordinance and then with the Act. Therefore, the learned counsel urged, by merely giving them the appellation ‘retires’ as the Government had done in this case, the group of persons who had attained the age of 55 years before the delayed date of giving effect to the reversal of policy could not be discriminated against. The question according to the learned counsel, was not one of retrospectivity at all, but one whether when making a legislation to right a or remedy a mis-



chief, a group of persons who had also been wronged and suffered the mischief could be excluded by the mere mechanics of delayed legislation. Shri Venugopal further submitted that several persons who are continuing in service by virtue of orders of stay obtained from the High Court were also sought to be sent away by the Government on the ground that had they not obtained the orders of stay, they would have retired from service on having attained the age of 55 years. This he urged was patently unreasonable. On the other hand, it was urged by the learned Advocate General of Andhra Pradesh, who appeared for the Government of Andhra Pradesh, Shri Shanti Bhushan, Shri Govindan Nair, Shri Parmeshwar Rao, Shri H. S. Guru Raja Rao and Shri Kanta Rao, learned counsel who appeared for the officers who were promoted in the vacancies created by the retirement of those who had attained the age of 55 years, that there was no discrimination whatever and that what the Government had done was merely to classify those employees who had ceased to be in service or who should have ceased to be in service and refused to apply the increased age of superannuation to them. It was said that having gone out of service, there was no question of their being eligible to the increased age of superannuation and therefore, the classification was perfectly reasonable. It was also urged that appointments and promotions were made subsequent to the reduction of the age of superannuation on regular basis and those appointments and promotions could not be dis-

urbed. We were told that interference by us at this stage would lead to administrative disorder, disaster and chaos. We would like to mention here that the learned Advocate General of Andhra Pradesh as well as the other learned counsel who appeared on either side presented their respective points of view very fairly and with moderation. The task of the learned Advocate General was particularly difficult as he stood between the devil and the deep sea as it were.

16. A situation such as the one before us had never presented itself to the court previously. Make this case a precedent for justice say one side; let this not be the first say the other. We have had cases where the age of superannuation had been raised from 55 to 58 years; we have had cases where having earlier raised the age of superannuation from 55 to 58 years, there was later a change of policy and the age of superannuation was once again reduced to 55 years. But this is the first occasion neither our researches nor those of the learned counsel have been able to trace another case of this kind — where the age of superannuation was first raised from 55 to 58 years, there was then a change of policy a few years later reducing the age of superannuation from 58 to 55 years and finally there was again, within a few months, a reversion to the higher age of superannuation of 58 years. The cases of *Bishnu Narain Mishra v. State of Uttar Pradesh*, (1965) 1 SCR 693 : (AIR 1956 SC 1567) and *K. Nag-*



araj v. State of Andhra Pradesh, AIR 1985 SC 551 belong to the second category of cases. In Bishnu Narain Mishra's case, by a notification dated November 27, 1957 the Government of Uttar Pradesh raised the age of superannuation from 55 to 58 years. On May 25, 1961 the Government reduced the age once again to 55 years, and further laid down that those who had continued beyond the age of 55 years owing to the earlier notification would be deemed to have been retained in service beyond the age of superannuation and would be compulsorily retired on December 31, 1961. The appellant who attained the age of 55 years on December 11, 1960 and was continued in service was one of those who was retired on December 31, 1961. He questioned the change in the rule of retirement on the ground that it was hit by Art. 14 inasmuch as it resulted in inequality between public servants in the matter of retirement. The argument was that when all those who had passed 55 years were asked to retire on December 31, 1961 some had just completed 55, some were 56, some were 57 and so on and, therefore, there was discrimination. Dealing with this question, Wanchoo, J speaking for the court observed :

“The last argument that has been urged is that the new rule is discriminatory as different public servants have in effect been retired at different ages. We see no force in this contention either. So far as the rule is concerned it applies equally to all public servants and fixes the age of retirement at

55 years. There is no discrimination in the rule itself. It is however urged that the second notification by which all public servants above the age of 55 years were required to retire on December 31, 1961 except those few who completed the age of 58 years between May 25, 1961 and December 31, 1961 shows that various public servants were retired at various ages ranging from 55 years and one day up to 58 years. That certainly is the effect of the second order. But it is remarkable that the order also fixed the same date of retirement namely December 31, 1961 in the case of all public servants who had completed the age of 55 years but not the age of 58 years before December 31, 1961. In this respect also, therefore, there was no discrimination and all public servants who had completed the age of 55 years was being introduced as the age of superannuation by the new rule by way of reduction were ordered to retire on the same date, namely December 31, 1961. The result of this seems to be that the affected public servants retired at different ages. But this was not because they retired at different ages but because their services were retained for different periods after fifty-five. Now it cannot be urged that if Government decides to retain the services of some public servants after the age of retirement it must retain every public servant for the same length of time. The retention of public servants after the period of retirement depends upon their efficiency and the exigencies of public service, and in the present case the difference in the



period of retention has arisen on account of exigencies of public service. We are, therefore, of opinion that the second notification of May 25, 1961 on which reliance is placed to prove discrimination is really not discriminatory' for it has treated all public servants alike and fixed December 31, 1961 as the date of retirement for those who had completed 55 years but not 58 years up to December 31, 1961. The challenge therefore, to the two notifications on the basis of Art. 14 must fail."

17. The situation which was considered in Bishnu Narain's case (AIR SC 1567) was exactly the identical situation which obtained on February 28, 1983 in the present case and precisely the situation which was considered by the judgement pronounced on January 18, 1985 and which is reported in AIR 1985 SC 551 as K. Nagaraj V. State of Andhra Pradesh, the very judgement the delay in pronouncing which is said to have led to this confusion. Neither in Bishnu Narain Misra's case nor in Nagaraja's case had the court occasion to consider the further step that had been taken in the present case, namely, once again raising the age of superannuation to 58 years and the exclusion of a class of persons from its benefit. Both the cases are therefore plainly distinguishable and are of no assistance to us in solving the problem before us.

18. Another case on which reliance was placed by the learned counsel appearing for the respondents in Writ Petition Nos. 3203, 3413, 3419, 3420-

3426 etc. of 1985 was State of Assam v. Padma Ram Borah, AIR 1965 SC 473. In that case a Government servant who was due to retire from service on and from January 1, 1961, was suspended from service on December 22, 1960 pending a departmental inquiry. His services were extended till March 31, 1961. The departmental inquiry was however, not concluded even by then. So on May 9, 1961, the Government passed an order extending his services for a period of 3 months with effect from April 1, 1961. This court held that the Government had no jurisdiction to extend the services of a Government servant, after he had retired from service merely for the purpose of continuing the departmental inquiry. Rule 56 of Departmental Rules did not authorise such a course. It is difficult to see how this case can possibly assist the respondents in writ petition Nos. 3203, 3413-3419, 3420-3426 etc. of 1985. It is one thing to say that the Executive Government has no power to pass an order extending the service of a Government servant after he has retired from service; it is altogether a different thing to say that the state while making a law raising the age of superannuation cannot make an unreasonable classification to exclude some Government servants from the benefit of the increased age of superannuation. The classification must pass the dual test of being reasonable and related to the object of the legislation besides not being arbitrary. It is not open to the State to make an arbitrary classification first by making the date



dependent on an uncertain event namely, the date of pronouncement of judgment by the supreme Court and next by making a legislation excluding persons who had attained the age of 55 years before the legislation took effect though the legislation itself was designed to undo the wrong already done to the very Government employees. Some other cases were also cited before us to illustrate the point that it is open to the Legislature and the Executive to choose a cut-off date for bringing into force laws such as I and Reform Laws etc. It is true that whenever a law is made or whenever an action is taken, it has to be with effect from a certain date but it does not necessarily follow that the choice of the date is not open to scrutiny at all. If the choice of the date is made burdensome to some of those, the wrong done to whom is sought to be rectified by the law, it would certainly be open to the court to examine the choice of the date to find out whether it has resulted in any discrimination.

19. We think that the one case which is really of assistance to us in this matter is the recent decision of the Constitution Bench in *D. S. Nakara v. Union of India*, (1983) 2 SCR 165 : (AIR 1983 SC 130). We propose not merely to quote extensively from Nakara's case, not merely to adopt the principles therein laid down but also to employ the very techniques applied there to solve the problem. The question arose there whether, for the purpose of application of the liberalised pension rules, the Government of India

could stipulate March 31, 1979 as the date for dividing Government employees into two classes : one class, who had retired before March 31, 1979 who would not be entitled to the benefits of the liberalised pension rules and the other class who retired after March 31, 1979 who would be entitled to such benefits. The submission was that the differential treatment accorded to those who had retired prior to the specified date was violative of Art. 14 as the choice of the date was arbitrary and the classification based on the fortuitous circumstances of retirement before or subsequent to the specified date was invalid. This submission was accepted by the Constitution Bench. Justice D. A. Desai speaking for a unanimous court, considered the question at great length in all the implications. First, considering the scope of Art. 14, it was observed :

“The decisions clearly lay down that though Art. 14 forbids class legislation, it does not forbid reasonable classification for the purpose of legislation. In other, however, to pass the test of permissible classification, two conditions must be fulfilled, viz. (i) that the classification must be founded on an intelligible differential which distinguishes persons or things that are grouped together from those that are left out the group and (ii) that differential must have a rational relation to the objects sought to be achieved by the statute in question...

The other fact of Art. 14 which must be remembered is that it eschews arbitrariness in any form Article 14 has,



therefore not to be held identical with the doctrine of classification." Thereafter the court posed the question :

"As a corollary to this well established proposition, the next question is, on whom the burden lies to affirmatively establish the rational principle on which the classification is founded correlated to the object sought to be achieved?"

The question was answered and it was said :

"The State, therefore, would have to affirmatively satisfy the Court that the twin tests have been satisfied. It can only be satisfied if the State establishes not only the rational principle on which classification is founded but correlates it to the objects sought to be achieved."

The submission made by the learned Attorney General on behalf of the Union of India was summarised :

"Thus according to the respondents, pensioners who retire from Central Government service and are governed by the relevant pension rules all do not form a class but pensioners who retire prior to certain date and those who retire subsequent to a certain date form distinct and separate classes. It may be made clear that the date of retirement of each individual pensioner is not suggested as a criterion for classification as that would lead to an absurd result, because in that event every pensioner relevant to his date of retirement will

form a class unto himself. What is suggested is that when a pension scheme undergoes a revision and is enforced effective from a certain date, the date so specified becomes a sort of a rubicon and those who retire prior to that date form one class and those who retire on a subsequent date form a distinct and separate class and no one can cross the rubicon."

The Court then proceeded to consider the question : what is a pension? and why a liberalised pension scheme. After answering these questions, the court referred to some of the very arguments now advanced before us that the date is an integral part of the scheme and so not severable from the scheme at all and that the Court should not usurp legislative functions. The learned Attorney General's argument on these questions was :

"The learned Attorney General contended that the scheme is one whole and that the date is an integral part of the scheme and the Government would have never enforced the scheme devoid of the date and the date is not severable from the scheme as a whole. Contented the learned Attorney General that the court does not take upon itself the function of legislation for persons or things or situations omitted by the legislature. It was said that when the legislature has expressly defined the class with clarity and precision to which the legislation applies it would be outside the judicial function to enlarge the class and to do is not to interpret but to



legislate which is the forbidden field. Alternatively it was also contended that where a larger class comprising two smaller classes is covered by a legislation of which one part is constitutional, the Court examines whether the legislation must be invalidated as a whole or only in respect of the unconstitutional part. It was also said that severance always cuts down the scope of legislation but can never enlarge it and in the present case the scheme as it stands would not cover pensioners such as the petitioner and if by severance an attempt is made to include them in the scheme it is not cutting down the class or the scope but enlarge the ambit of the scheme which is impermissible even under the doctrine of severability. In this context it was lastly submitted that there is not a single case in India or elsewhere where the Court has included some category within the scope of provision of a law to maintain its constitutionality."

Proceeding then to meet the submission of the learned Attorney General, Desai, J. said."

"If it appears to be indisputable, as it does to us that the Pensioners for the purpose of pension benefits form a class, would its upward revision permit a homogeneous class to be divided by arbitrarily fixing an eligibility criterion unrelated to purpose of revision, and would such classification be founded on some rational principle? The classification has to be based, as is well settled, on some rational principle and the ratio-

nal principle must have nexus to be the objects sought to be achieved. We have set out the objects underlying the payment of pension. If the State considered it necessary to liberalise the pension scheme, we find no rational principle behind it for granting these benefits only to those who retired subsequent to that date simultaneously denying the same to those who retired prior to that date. If the liberalisation was considered necessary for augmenting social security in old age to government servants then those who retired earlier cannot be worse off than those who retire later. Therefore, this division which classified pensioners into two classes is not based on any rational principle and if the rational principle is the one of dividing pensioners with a view to giving something more to persons otherwise equally placed, it would be discriminatory. To illustrate, take two persons, one retired just a day prior and another a day just succeeding the specified date. Both were in the same pay bracket the average emolument was the same and both had put in equal number of years of service. How does a fortuitous circumstance of retiring a day earlier or a day later will permit totally unequal treatment in the matter of pension? One retiring a day earlier will have to be subject to ceiling of Rs. 8, 100 p. a. and average emolument to be worked out on 36 months' salary while the other will have a ceiling of Rs. 12,000 p. a. and average emolument will be computed on the basis of last ten months, average. The artificial division stares into fact and is unrelated to any principle and



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form a class unto himself. What is suggested is that when a pension scheme undergoes a revision and is enforced effective from a certain date, the date so specified becomes a sort of a rubicon and those who retire prior to that date form one class and those who retire on a subsequent date form a distinct and separate class and no one can cross the rubicon."

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legislate which is the forbidden field. Alternatively it was also contended that where a larger class comprising two smaller classes is covered by a legislation of which one part is constitutional, the Court examines whether the legislation must be invalidated as a whole or only in respect of the unconstitutional part. It was also said that severance always cuts down the scope of legislation but can never enlarge it and in the present case the scheme as it stands would not cover pensioners such as the petitioner and if by severance an attempt is made to include them in the scheme it is not cutting down the class or the scope but enlarge the ambit of the scheme which is impermissible even under the doctrine of severability. In this context it was lastly submitted that there is not a single case in India or elsewhere where the Court has included some category within the scope of provision of a law to maintain its constitutionality."

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whatever principle, if there be any has absolutely no nexus to the objects sought to be achieved by liberalising the pension scheme. In fact this arbitrary division has not any no nexus to the liberalised pension scheme but it is counter productive and runs counter to the whole gamut of pension scheme. The equal treatment guaranteed in Art. 14 is wholly violated inasmuch as the pension rules being statutory in character, since the specified date, the rules accord differential and discriminatory treatment to equals in the matter of commutation of pensions. A 48 hours difference in matter of retirement would have a traumatic effect Division is thus both arbitrary and unprincipled. Therefore the classification does not stand the test of Art. 14"

The Court then asked itself the question: "By our approach, we are making the scheme retroactive?" The answer was an emphatic 'No'. They said,

"In other words, benefit of revised scale is not limited to those who enter service subsequent to the date fixed for introducing revised scales but the benefit is extended to all those in service prior to that date. This is just and fair. Now if pension as we view it, is some kind of retirement wages for past service, can it be denied to those who retired earlier, revised retirement benefits being available to future retirees only?" Therefore, there is no substance in the contention that the court by its approach would be making the scheme retroactive,

because it is implicit in theory wages."

The Court finally considered favourite argument advanced against what some of the counsel who appeared before us described as judicial tinkering with legislative policy. The Court took the view that the State cannot 'Take it or leave it.' If there are words in a statute which bring about discrimination, those words can be severed. 'They said. There is nothing immutable about the choosing of an event as an eligibility criterion subsequent to a specified date. If the event is certain but its occurrence at a particular time is considered wholly irrelevant and arbitrarily selected having no rationale for selecting it and having an undesirable effect of dividing homogeneous class and of introducing the discrimination, the same can be easily severed and set aside. While examining the cases under Art. 14, the approach is not 'either take it or leave it', the approach is removal of arbitrariness and if that can be brought about by severing the mischievous portion the court ought to remove the discriminatory portion retaining the beneficial portion. The pensioners do not challenge the liberalised pension scheme. They seek the benefit of it. Their grievance is of denial to them of the same by arbitrary introduction of words of limitation and we find no difficulty in severing and quashing the same. This approach can be legitimised on the ground that even Government Servant retires State grants



upward revision of pension undoubtedly from a date. Event has occurred revision has been earned. Date is merely to avoid payment of arrears which impose a heavy burden. If the date wholly removed, revised pensions will have to be paid from the actual date of retirement of each pensioner. That is impermissible. The State cannot be burdened with arrears commencing from the date of retirement of each pensioner. But effective from the specified date future pension of earlier retired Government servants can be computed and paid on the analogy of fitments in revised pay-scales becoming prospectively operative. That removes the nefarious unconstitutional part and retain, the beneficial portion. It does not adversely affect future pensioners and their presence in the petitions becomes irrelevant. But before we do so, we must look into the reasons assigned for illegibility criteria, namely, in service on the specified date and retiring after that date'."

The learned Judges then expressed their disinclination to share the fear expressed by the learned Attorney General that the Parliament would not have enacted the measure if the unconstitutional part was struck down and added "Our approach may have a parliamentary flavour to sensitive noses." Dealing with the question of frame of relief, the Court struck down as unconstitutional the words, "that in respect of the Government servants who were in service on the 31st March, 1979 and retiring from service on or after that

date" and the words "the new rates of pension are effective from 1st April, must look into the reasons assigned for illegibility criteria, namely, "in service on the specified date and retiring after that date'."

The learned Judges then expressed their disinclination to share the fear expressed by the learned Attorney General that the Parliament would not have enacted the measure if the unconstitutional part was struck down and added. "Our approach may have a parliamentary flavour to sensitive noses". Dealing with the question of frame of relief, the Court struck down as unconstitutional the words, "that in respect of the Government servants who were in service on the 31st March, 1979 and retiring from service on or after that date" and the words "the new rates of pension are effective from 1st April, 1979 and will be applicable to all service officers who became/become non-effective on or after that date" in the impugned memoranda, but specified that "the date mentioned therein will be relevant as being one from which the liberalised pension schemes becomes operative to all pensioners governed by 1972 Rules irrespective of the date of retirement." It was declared "all pensioners governed by the 1972 Rules and Army Pension Regulations shall be entitled to pension as computed under the liberalised pension scheme from the specified date, irrespective of the date of retirement."

20. In the course of our narration, we have already stated our conclusions



on several of the questions at issue, both factual and legal. The final situation that emerges is that almost immediately after the age of superannuation was reduced from 58 to 55 years, it was realised by the Government of Andhra Pradesh that they had taken a step in the wrong direction and that serious wrong and grave injustice had been done to their employees. A decision was very soon taken to redress the wrong by reversing the decision but an unfortunate rider was added that they should wait till the pronouncement of the judgement of the Supreme Court, which was perhaps expected to be pronounced shortly. As the judgement was not pronounced for long, it became imperative for the Government to implement their decision of their own accord and so they passed Ordinance No. 24 of 1984, and Act No. 3 of 1985, amending Act No. 23 of 1984 by substituting 58 years for 55 years. While doing so, unfortunately again, those that had suffered most by being compelled to retire between 28-2-83 and 23-8-84 were denied the benefit of the legislation by Cl. 3 (1) of the Ordinance and S. 4 (1) of Act No. 3 of 1985. Now if all affected employees hit by the reduction of the age of superannuation formed a class and no sooner than the age of superannuation was reduced, it was realised that injustice had been done and it was decided that steps should be taken to undo what had been done, there was no reason to pick out a class of persons who deserved the same treatment and exclude from the benefits of the benefi-

cent treatment by classifying them as a separate group merely because of the delay in taking the remedial action already decided upon. We do not doubt that the Judge's lyfriend and counsellor, 'the common man', if asked, will unhesitatingly respond that it would be plainly unfair to make any such classification. The commonsense response that may be expected from the common man, untrammelled by legal lore and learning, should always help the judge in deciding questions of fairness, arbitrariness etc. Viewed from whatever angle to our minds, the action of the Government and the provisions of the legislation were plainly arbitrary and discriminatory. The principle of Nakar clearly applies. The division of Government employees into two classes, those who had already attained the age of 58 on 28-2-83 and those who attained the age of 55 between 28-2-83 and 23-8-84 on the one hand, and the rest on the other, and denying the benefit of the higher age of superannuation to the former class is as arbitrary as the division of Government employees entitled to pension in the past and in the future into two classes, that is, those that had retired prior to a specified date and those that retired or would retire after the specified date and confining the benefit of the new pension rules to the latter class only. Legislations to remedy wrongs ought not to exclude from their purview persons, a few of the wronged unless the situation and the circumstances make the redressal of the wrong, in their case, either impossible or so dete-



imental to the public interest that the mischief of the remedy outweighs the mischief sought to be remedied. We do not find that there is any such impossibility or detriment to the public interest involved in reinducting into service those who had retired as a consequence of the legislation which was since thought to be inequitable and sought to be remedied. As observed in *Nakara* (AIR 1983 SC 130), the burden of establishing the reasonableness of a classification and its nexus with the object of the legislation is on the State. Though no calamitous consequences were mentioned in any of the counter-affidavits, one of the submissions strenuously urged before us by the learned Advocate General of Andhra Pradesh and the several other counsel who followed him was the oft-repeated and now familiar argument of 'administrative chaos'. It was said that there would be considerable chaos in the administration if those who had already retired are now directed to be reinducted into service.

21. We are afraid we are unable to agree with this submission. Those that have stirred up a hornet's nest cannot complain of being stung. The argument about administrative chaos has been well met by Lord Denning M. R. in *Bradbury v. London Borough of Enfield*, (1967) 3 All ER 434, where the Master of Rolls in his characteristic and forceful way observed :

"It has been suggested by the Chief Education Officer that, if

an injunction is granted, chaos will supervene. All the arrangements have been made for the next term, the teachers appointed to the new comprehensive schools, the pupils allotted their places, and so forth. It would be next to impossible, he says, to reverse all these arrangements without complete chaos and damage to teachers, pupils and public. I must say this : if a local authority does not fulfil the requirements of the law, this court will set that it does fulfil them. It will not listen readily to suggestions of "chaos". The department of education and the council are subject to the rule of law and must comply with it, just like everyone else. Even if chaos should result, still the law must be obeyed but I do not think that chaos will result. The evidence convinces me that the "chaos" is much over stated.....I see no reason why the position should not be restored, so that the eight schools retain their previous character until the statutory requirements are fulfilled. I can well see that there may be considerable upset for a number of people, but I think it far more important to uphold the rule of law Parliament has laid down these requirements so as to ensure that the electors can make their objections and have them properly considered. We must see that their rights are upheld"

In the present case too we think that the case of chaos is much overstated. The affidavits do not disclose what disastrous consequences, insoluble problems and unsurmountable difficulties will follow and how chaos will in-



evitably result. True quite a large number of employees who have been promoted will have been promoted will have to be reverted, but their promotions and promotional-appointments are all temporary (and we take care to add here it would make no difference even if a few were regularly promoted) and it is not as if they lose for ever their promotional opportunities. The promotional opportunities are merely postponed to the dates on which they would be entitled to be promoted had not the fundamental rules and the Hyderabad Civil Services Rules been amended and Act No. 23 of 1984 passed. What has now happened is that these persons have secured a double advantage First, by the initial reduction of the age of superannuation, they obtained early and unanticipated promotion, that is to say promotion ahead of the normal date on which they would have otherwise been promoted; and second, their tenure in the promoted post was increased by a further three years as a result of the subsequent increase of the age of superannuation. Having secured this double advantage they naturally desire to stick to them and talk glibly of hardship and inconvenience. On the other hand, it would be a great injustice to deny justice to those who have suffered injustice most merely because it may cause inconvenience to the administration. We are governed by the Constitution and constitutional rights have to be upheld. Surely the Constitution must take precedence over convenience and a judge may not turn a bureaucrat. We do not mean to suggest that crea-

tion of a chaotic state of administration is not a circumstance to be taken into account. It may be possible that in a given set of circumstances, portentous administrative complexity may itself justify a classification. But, there must be sufficient evidence of that.....how the circumstances will lead to chaos. Ups and downs of career bureaucrats do not by themselves justify such a classification. It may, however, be of some consequence in the matter of granting relief. For instance, there would be readily no point in reinducting an employee if he has but a month or two to go to attain the age of 58 years and to retire. Reinduction of such a person is not likely to be of any use to the administration and may indeed be detrimental to the public interest. It is bound to be wasteful. In such cases as well as in cases where they cannot be reinducted because they have already completed 58 years by now they cannot obviously be reinducted. So other ways of compensating them must be found. The obvious course is to compensate them monetarily. In Industrial Law we do award back and future wages on quite a large scale and there is no reason why we cannot adopt the same principle here. It is as if we rule private employers in such situations are asked to pay back wages, we see no impediment in doing so in the case of those that are expected to be model employers i. e. the Government, public corporations and local authorities.

22. An argument which requires to be dealt with is that it is open to the



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**O. Chinnappa Reddy**  
**Judge**  
**Supreme Court of India**

Court to give retrospectivity to a legislation to which the legislature plainly and expressly refused to give retrospectivity. As pointed out in Nakara's case (AIR 1983 SC 130), the question is not one of retrospectivity at all. The circumstance that the relief given by Ordinance No. 24 of 84 and Act No. 3 of 1985 is not intended to those who had attained the age of 55 years by February 28, 1983 or between 28-2-83 and 23-8-84, has the effect of limiting the field of operation of the Ordinance and the Act and introducing a classification which in order to be sustained must be shown to be reasonable and to have a nexus to the object to be achieved besides not being arbitrary. While it is a general rule of law that statutes are not to operate retrospectively, they may so operate by express enactment, by necessary implication from the language implied or where the statute is explanatory or declaratory or where the statute is passed for the purpose of protecting the public against some evil or abuse or where the statute engrafts itself upon existing situations etc. But it would be incorrect to call a statute retrospective, "because a part of the requisites for its action is drawn from a time antecedent to its passing". (Vide *R v. St. Mary. Whitechapel (Inhabitants)* (1848) 12 QB 120). We must further remember, quite apart from any question of retrospectivity, that, unlike in the United Kingdom here in India we have a written Constitution which confers justiciable fundamental rights and so

the very refusal to make an Act retrospective or the non-application of the Act with reference to a date or to an event that took place before the enactment may, by itself, create an impermissible classification justifying the striking down of the non-retroactivity or (non-retroactivity or non-retroactivity or) non-application clause, as offending the fundamental right to equality before the law and the equal protection of the laws. That is the situation that we have here.

23. We may now refer to two arguments which were mentioned in passing but were not pursued. The first was that a writ petition similar to Writ Petitions Nos. 3420-3426/83 etc. had been filed earlier and had been dismissed in limine by a Bench of this Court. We do not see how the dismissal in limine of such a writ petition can possibly bar the present Writ Petitions. Such a dismissal in limine may inhibit our discretion but not our jurisdiction. So the objection such as it was, was not pursued further. So also the second objection which related to the non-joinder of all affected parties to the litigation. We are quite satisfied that even if some individual affected parties have not been impleaded before us their interests are identical with those and have been sufficiently and well represented. Further, the relief claimed in Writ Petitions Nos. 3420-3426 of 1984 etc. is of a general nature and claimed against the State and no particular relief is claimed against any individual party. We do not think that



the mere failure to implead all affected parties is a bar to the maintainability of the present petitions in the special circumstances of these cases where the actions are really between two "warring groups".

24. Finally we come to the question of the relief to be granted. We find that Cl. 3(1) of Ordinance No. 24 of 84 and S 4(1) of Act No. 3 of 1985 may easily be brought to conform to the requirements of Art. 14 of the Constitution by striking down or omitting the naughty word 'not' from those provisions. We may possibly achieve the same object by striking down the whole of Cl. 3(1) of the Ordinance and S 4(1) of the Act but then the question may arise whether the rest of the Act would be sufficient to bring in those who have been excluded. We think that the safer course would be to strike down the offending word 'not' from these provisions. That we have such power is clearly laid down in *Nakara's* case where the court directed the deletion of some words from the offending clause and directed it to be read without those words. To make matters clear and to put them beyond dispute, we give the following directions in exercise of our powers under Art. 32 and 142 of the Constitution.

"1. All employees of the Government, public corporations and local authorities, who were retired from service on the ground that they had attained the age of 55 years by 28-2-83 or between

28-3-83 and 23-8-84, shall be reinstated in service provided they would not be completing the age of 58 years on or before 31-10-1985.

2. All employees who were compelled to retire on February 28, 1983 and between February 28, 1983 and August 23, 1984 and who are not eligible for reinstatement under the first clause shall be entitled to be paid compensation equal to the total emoluments which they would have received, had they been in service, until they attained the age of 58 years, less any amount they might have received ex gratia or by way of pension etc. Or under the interim orders of this Court. They will be entitled to consequential retiral benefits.

3. Such of the employees as have not been compelled to retire by virtue of orders of stay obtained from the High Court or the Administrative Tribunal, or who have actually been reinstated in service pursuant to interim orders of this Court, shall be allowed to continue in service until they attain the higher age of superannuation.

4. The reinduction of those employees that have been compelled to retire previously will put them back as regards their seniority in precisely the same position which they occupied before they were retired from service. They will be entitled to all further consequential benefits.

5. The employees who were retired and who are reinducted will be entitled to be compensated for the period during



**O. Chinnappa Reddy**  
**Judge**  
**Supreme Court of India**

which they were out of service in the same manner as mentioned in clause (2).

6. In the matter of reinduction of employees who do not attain the age of 58 years on or before 31st October, 1985, the Government may exercise an option not to reinduct them in the case of all or some or any of the employees, as the case may be, provided the employees are paid the compensation as in the case of those covered by (2) and (5).

7. All interim orders are vacated and subject to these directions, the Government is free to revert persons promoted or appointed to the posts held by persons who were retired on having attained the age of 55 years by 28-2-1983 or between 28-2-83 and 23-8-84 to the posts which they held on February 28, 1983 or on the dates previous to their promotion or appointment provided that they need not be so reverted, if they would otherwise be entitled to be promoted or appointed even if the other employees had not been retired consequent on the lowering of the age of superannuation.

8. The Government shall be free to create supernumerary posts wherever they consider it necessary so to do.

9. All payment of compensation to be made and completed before December 31, 1985. If for any reason the Government finds itself unable to pay the entire amount at one time within the fixed by us, the Government will be at liberty to pay the amount in not

more than four instalments within the time stipulated by us. The Government will also have the liberty to apply to us for extension of time, if so advised. Where the employees are awarded compensation by the Government, such employees may apply to the concerned Income-tax Officer for relief under Sec-89 of the Income-tax Act read with R. 21A of the Income-tax Rules and the Income-tax officer concerned will grant the appropriate relief."

25. With these directions, Writ Petitions Nos. 3420-26 of 1985 etc. are allowed with costs and Writ Petitions Nos. 5447-5546 of 1982 etc. are dismissed but in the special circumstances without any order as to costs.

KHALID, J. : 26. After considering the rival contentions put forward by the learned counsel on both sides, the factual matrix and law involved, the following points gave me some difficulty in accepting the petitioners' case. I felt that these points posed hurdles in the way of the petitioners succeeding in their attempt to secure the relief sought. I am formulating the points as I understood them.

(1) This Court in *K. Nagaraja v. State of A. P.*, AIR 1985 SC 551 upheld the action of the Government in reducing the age of retirement from 58 to 55. The contention that such reduction was arbitrary and irrational was not accepted. Further, the contention that the age of superannuation was increased from 55 to 58 years with effect from October 29, 1979, after an elaborate and scientific



enquiry by a one-man pay commission did not find favour with this Court because it felt that the question of the age of retirement was not referred to the Commission. Accordingly the Court held that the decision regarding the age of retirement was a matter of policy in the formulation of which the Government must be allowed a free and fair role to play. It is not always necessary that such a decision is taken on the basis of empirical data collected on scientific investigation. The further submission that the decision to reduce the age of retirement from 58 to 55 years was arbitrary in view of the fact that it was taken by the State Government within one month of the assumption of office by it also did not find favour with this Court. This Court observed that the reasonableness of a decision in any jurisdiction, did not depend upon the time which it took. This decision has become final and the petitioners before us cannot in any manner question it. This decision is, therefore, an authority for the proposition that the charge of arbitrariness cannot be laid at the doors of the Government in matters relating to policy decision and that the Government have full powers to decide about the age of retirement considering the various data available before it.

(2) *Bishun Narain Mishra v. State of U. P.* (1965) 1 S CR 693 : (AIR 1965 SC 1567) is a decision rendered by a Constitution Bench of this Court. In that case, a notification on November 27, 1957, raised the age of superannuation from 55 to 58 years. On May 25,

1961, the age of retirement was reduced once again to 55 years. It was provided in the second notification that those who were retained in service beyond the age of superannuation on the basis of the earlier notification would be compulsorily retired on December 31, 1961. The second notification was questioned as being arbitrary and hit by Art. 14 since it resulted in inequality between the public servants in the matter of retirement. In this Judgement the classification of Government employees who were in service into two groups based on the age was upheld by the Constitution Bench as a reasonable classification. It was held that this case had a great bearing on the petitions before us and the principle laid down there could be extended to the cases before us. It was strongly contended that if classification of two groups of in-service employees on the basis of age and a cut off date could be justified as reasonable classification, it can be more so in cases like the one before us where the classification is between retired employees and those in service.

(3) By the operation of a valid law some employees have retired by superannuation and have thus ceased to be members of their respective services. What is now attempted is to retrospectively re-induct them into service, a procedure that Courts should frown upon and not encourage.

(4) For the purpose of the case before us, *Bishun Narain Mishra* case is more appropriate and useful than that of *D. S. Nak*



v. Union of India (1983) 2 SCR 165: (AIR 1983 SC 130) which dealt with two classes of retired employees and a cut off date. The attempt to distinguish Bishun Narain's case on the factual difference available in these cases is a matter for further probe, in order to see how far the distinction is destructive of the principle laid down there in its application to these cases.

(5) The original attempt by the petitioners was to get Section 3 of the amending Act struck down in its entirety. Now they realise that such a relief would not serve their purpose. What they now want is that this Court should remove the word 'not' from the Section, so that the petitioners will be rescued from the mischief of that word. Removing a word or adding words to a legislative enactment is an exercise, Courts have been repeatedly warned against from embarking upon. I personally feel that this guideline is one that has to be (illegible) (sic).

(6) A petition, similar to the one before us, was filed in this Court as W. P. No. 16080/1984 raising identical points. This writ petition came up for hearing on 12-2-1985 before a Bench consisting of the Chief Justice, Justice D.A. Desai and Justice A.N. Sen. After hearing the counsel for the petitioner as well as the State of Andhra Pradesh, the Bench suggested that the counsel for the State should take instructions from the State of Andhra Pradesh about reinstating in service of those persons

who had not attained 58 years of age, but without back wages. The case was adjourned to 19-2-1985 for that purpose. I understand that counter affidavits were also filed in that case. The case appeared before a Bench consisting of Justice R. S. Pathak and Justice A. Varadarajan on the next occasion. On that occasion, the petition was dismissed, after hearing. Normally this Court will be disinclined to entertain or to hear petitions raising identical points again where on an earlier occasion, the matter was heard and dismissed. Not that this Court has no jurisdiction to entertain such matters, but would normally exercise its discretion against it. One of the counsel appearing for the respondents strongly pleaded the bar of res judicata against these petitions on the basis of the earlier decision.

(7) The learned Advocate General of the Andhra Pradesh with great concern and justifiably appealed to us that if the petitions were allowed, it would cause serious dislocation in the administration. He strongly pleaded that the action taken did not have any tinge of mala fides that there was no attempt at picking and choosing of any Government servant and that therefore the Court should not exercise its jurisdiction to annul a policy decision.

27. I have given my anxious considerations to the above question and the rival submissions in reply. I find that the case is more or less evenly balanced between the parties. Two important factors have, however, per-



suaded me, to agree with the main Judgment and to ear on the side of Justice more than that of law, invoking the benevolent jurisdiction under Art. 142 (1) of the Constitution of India which reads :

“142 (1) The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or order so made shall be unforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe.”

28. These petitions involve a serious human problem Employees of the State with limited sources, who have been planning their future with a secure feeling that they could work till the age of 58 years, have as though overnight, been robbed of their tenure, their aspirations and future. They have become the helpless victims of certain swift moves on the political chess board. These swift moves, perhaps taken in a hurry, without serious application of mind have resulted in arbitrariness that has been forcefully project by the petitioners. This plea cannot be light heartedly thrown overboard. Justice demands that the petitioners should be saved of their predicament.

29. The second factor that has prevailed upon the me to give succour to

the petitioners is the blame that this Court has to share for the sorry state that has come to pass in the matter. Without meaning disrespect to anyone, I firmly believe, that prompt action by the Court, would have eased the situation, considerably and relieved the petitioners of their sad plight and use of this avoidable exercise. It is not as the subsequent developments were not brought to the notice of this Court in Nagaraja's case, (AIR 1985 SC 551) (supra). We were told that the Bench was alerted in time about the developments that had taken place but unfortunately they were not taken this account. When the judgment ultimately came on 18-1-1985 as many as 6000 employees had lost their service, a tragic result not based on any relevant consideration having a nexus to the age of superannuation. The damage had been done and it chn be repaired only by extending this Court's powers to a section of employees who deserves sympathy and fair deal.

30. This short judgment is only to vindicate my stand I respectfully agree with the judgment prepared by my learned brother Reddy, J. I am also in entire agreement with my learned brother Eradi, J. about the limited scope of the principles laid down in these cases on their peculiar facts.

**BALAKRISHNA ERADI, J. :—31.**  
 While respectfully agreeing with the judgment prepared by my learned Brother Reddy, J. I have thought it fit to add



a few words of my own since I consider it necessary to make it absolutely clear that the conclusion reached by us in these cases are based entirely on the special facts and circumstances constituting the legislative history of the impugned Andhra Pradesh Ordinance No. 24 of 1984 and Act 3 of 1985 which have been set out in extenso in the judgment of Reddy, J.

32. We are not to be understood as laying down that whenever the age of superannuation of Government employees of employees of local authorities etc. is enhanced the benefit of such enhancement should be extended not merely to persons in service on the date on which the change is effected but also to persons who have already retired from service prior to that date. It is now well established by decisions of this Court that the Government has full power to effect a change in the age of superannuation of its employees on relevant considerations. If in the exercise of such power the age of superannuation is enhanced purely by way of implementation of a policy decision taken by the Government, such alteration can legally be brought about with prospective effect from the date of the commencement of the operation of the Ordinance, Act or Rule and no question of violation of Art. 14 or 16 of the Constitution will arise merely because the benefit of the change

is not extended to employees who have already retired from service. In these cases now before us our conclusion is rested entirely on the finding arrived at by us after a consideration of the factual background and legislative history of the impugned Ordinance and Act that the underlying purpose and object behind the relevant provisions of the Ordinance and the Act was to set right and nullify a wrong or injustice that had been done to the employees by the abrupt reduction of the age of superannuation from 58 years to 55 years by Ordinance No. 8 of 1983 and the Government's Notification issued as per G. O. Ms. No. 36, dated 8th February, 1983 which preceded it. All that we are holding is that in the context of these telling facts and circumstances which conclusively show that the object and purpose of the Legislation was to set right the injustice that had been done, there is no rational or reasonable nexus or basis for separately classifying the employees who had retired from service prior to the date of commencement of Ordinance No. 23 of 1984, who are the persons most affected by the wrong .....by denying to them the benefit of the rectification of the injustice. It is solely on this ground that we are allowing these writ petitions and granting the reliefs specified in the judgment of Reddy, J.

Order accordingly.



IT IS THE ESSENCE OF DEMOCRACY  
TO OBEY  
NO MASTER BUT THE LAW



## OBSERVATION

(A) **Selection—Competitive examination—Written test and viva-voce—28 per cent marks prescribed for viva-voce—Weight to be given to the viva-voce test as against the written examination, must vary from service to service according to the requirement of the service—Prescribing of 28 per cent of marks for viva-voce not arbitrary on ground that the same exceeded 12 per cent of total marks taken into account for selection—Constitution of India, Arts 14, 16 and 309—Haryana Excise and Taxation Inspectorate (State Service, Class III) Rules (1969), Appendix D.**

(B) **Selection—Competitive examination—Large number of candidates were called for interviews by itself does not vitiate the selection—Constitution of India, Arts. 14 and 19.**

## OBSERVED BY

Mr. Prem Chand Jain, Mr. C. J., Sukhdev Singh  
 Kang and Mr. I. S. Tiwana  
 Hon'ble Judges, P. & H. High Court

## IN

Civil Writ Petition No. 833 of 1986 decided on 17-7-1986 in the case of Joginder Singh Petitioner v. State of Haryana and others, Respondents.

## TEXT

Prem Chand Jain, C.J.:— This judgement of ours would dispose of this and the connected C. P. W. No. 554 of 1986 (Virender Singh v. State of Haryana and others) as common questions of law and fact arise in both these petitions.

2. In order to appreciate the controversy, certain salient features may be noticed from this petition.

3. Sometime in July 1982, Subordinate Service Selection Board (hereinafter referred to as 'Board') invited applications for recruitment to 29 posts of Taxation Inspectors. These posts of Taxation Inspectors are governed by

the statutory rules called 'The Haryana Excise and Taxation Inspectorate' (State Service, Class III) Rules, 1969 (hereinafter called 'the Rules'). Appendix 'D' to the Rules which makes provision relating to the subjects and standard of the competitive examination of candidates for the post of Inspectors, is in the following terms :—

"1. (1) The examination shall comprise four papers and a viva voce.

(2) The questions papers of English and General knowledge will be answered in English, while those of Hindi in Hindi.

(3) No candidate shall be deemed



to have qualified for the viva voce unless he obtains a minimum of 33 per cent marks in each subject and a minimum of 40 per cent in the aggregate. There shall, however, be no minimum for the viva voce. The total marks of the written papers and viva voce will determine the rank of the candidate.

(4) The following will be the subjects of the examination :

- |                               |                |
|-------------------------------|----------------|
| (1) English                   | .....100 marks |
| (2) Hindi in Devnagri script) | 50 marks       |
| (3) General knowledge ...     | 100 marks      |
| (4) Viva Voce                 | ..... 100marks |

4. The petitioner appeared in the written test and was declared successful and called for interview on 14th December, 1985, at New Delhi. The petitioner appeared before the Board. It is averred in the petition that the petitioner was interviewed for about  $\frac{1}{2}$  minutes and only formal questions like name and father's name were asked. No other question of any type was asked. On the conclusion of the interview, in the first week of January 1986 the Board recommended 49 persons for the post of Taxation Inspectors.

5. The petitioner through this petition has called in question the validity and legality of the selection on the allegations that the marks allocated for viva voce are 100 marks which come to 28.5 per cent, that in view of the judgement of the Supreme Court in Ashok Kumar Yadav v. State of Haryana, (1985) 4 SCC 417, providing of 28.5 per cent marks for viva voce is on the

higher side and the selection of Taxation Inspectors is bad in law, in spite of the direction issued by Supreme Court in Ashok Kumar Yadav's case (supra) that the marks allotted for viva voce test shall not exceed 12.2 per cent of the total marks taken into account for the purpose of selection, the Board has acted improperly and committed patent illegality in keeping viva voce marks at 28.5 per cent that the higher per centage of marks has been kept by the Board with a view to absorb the kith and kind of the members, that in Ashok Kumar Yadav's case (supra) the Supreme Court has held that the number of candidates called shall not be more than thrice the number of vacancies, but in the instant case there were only 29 vacancies and the Board called 494.....candidates for interview which was about 16 times of the vacancies and that candidates were interviewed for only one or two minutes with the result that it was not possible for the Members to judge the suitability of the candidates in such short time. On the basis of these allegations, the action of the Board has been challenged being arbitrary and violative of the judgement of the Supreme Court in Ashok Kumar Yadav's case (supra) and of Arts. 14 and 16 of the Constitution.

6. The petition came up for motion hearing on 20th, February, 1986 when the Bench issued notice of motion. In response to the notice, Shri L. M. Mehta, Excise and Taxation Commissioner, respondent No. 2, has filed a det



ailed written statement in which the material allegations made in the petition have been controverted inter alia on the grounds that respondent No. 2 had sent a revised demand to respondent No. 3 on 4th July, 1985 for 79 candidates of different categories, which included the earlier demand for 29 candidates, that the Board had recommended 49 candidates in the month of January 1986, that the observations of the Supreme Court in Ashok Kumar Yadav's case (1986) Lab IC 1417 (supra) are relevant for the purpose of competitive examination in the case of selection to the Haryana Civil Service (Executive Bench) and other allied services and the same cannot, ipso facto, be made applicable in the case of selection to the post of Taxation Inspectors, that no exaggerated weight has been given to the viva voce test in the case of selected candidates with proven or obvious oblique motives and, therefore, the selection is not tainted with any illegality whatsoever, that respondent No. 2 had sent a revised requisition for 79 posts and if large number of candidates are called for interview, that fact by itself does not vitiate the selection and that the selection made by the Board is in accordance with the rules and the advertisement made.

7. After the filing of the written statement, the matter finally came up for hearing before the Bench on 12th March, 1986, when the following order was passed:—

"In this petition under Art. 226 of the Constitution, the selection of the

Taxation Inspectors by the Subordinate Services selection Board Haryana has been challenged on the ground that out of the total marks of 350 for written and viva voce test, 100 marks were allotted to the latter which clothed the said Board with arbitrary powers. Support for this plea was sought from a recent decision of the Supreme Court in Ashok Kumar Yadav v. State of Haryana (1985) 2 Serv LJ 482.

The petition has been opposed by the State as well as by the persons who have been selected. Mr. Kuldip Singh, the learned counsel for some of the selected persons has brought to our notice a recent judgment of the Division Bench of this Court in Civil Writ Petition No. 4777 of 1985 (Sukhdev Singh Nirwan v. The State of Punjab) decided on February 21, 1986 wherein the attack sought to be made on the ground that 35 per cent marks were allotted for interview, was turned down. From the perusal of this judgment we find that the rule laid down by the Supreme Court in Ashok Kumar Yadav's case (supra) was not taken notice of by the Bench. In the case of fresh entrants to the service through competition, the Supreme Court had directed that marks for viva voce test shall not exceed more than 12.2 per cent for the general category and 25 per cent in the case of ex service officers. The competitors in the present case were the first entrants to the service and in our view 28% marks for the interview were highly excessive and clothed the Board with arbitrary power. Even if in a given



case, the candidate who was ahead by 50 marks than the other candidate, the Board by allotting 80 marks to the latter and 20 marks to the former could select the person who was far below the other person in the written test. It was exactly such like arbitrary power of selection with the Board which was sought to be avoided by the Supreme Court in Ashok Kumar Yadav's case (supra), we are, therefore, of the view that the Division Bench decision in Sukhdev Singh's case (supra) needs reconsideration by a larger Bench. This case may be put up before the learned Chief Justice for referring the matter to a larger Bench."

8. This is how we are seized of the matter.

9. The first contention raised by Mr. Malik, learned counsel for the petitioner, was that in comparison to the marks allocated to the written examination, the proportion of the marks allocated to the viva voce test was quite high and that introduced an irredeemable element of arbitrariness in the selection process so as to offend Arts. 14 and 16 of the Constitution. In support of his contention, the learned counsel placed reliance on the judgment of the Supreme Court in Ashok Kumar Yadav's case (supra). In other words, the prewise contention of the learned counsel for the petitioners was that in Ashok Kumar Yadav's case (1986 Lab IC 1417) (supra) it has authoritatively been held that where the competitive examination consists of a written examination followed by a viva voce test, the

marks allocated for the viva voce test shall not exceed 12.2 per cent of the total marks taken into account for the purpose of selection and as the viva voce marks in the instant case exceed 12.2 per cent of the total marks, the selection made by the Board being contrary to the decision of the Supreme Court in Ashok Kumar Yadav's case (supra) is illegal, arbitrary and offend Arts. 14 and 16 of the Constitution. On the other hand, the learned Advocate-General, Haryana, and Shri Kuldeep Singh, Senior Advocate, submitted that the judgment in Ashok Kumar Yadav's case (supra) is not being properly read by the learned counsel for the petitioners, as no such rule has been laid down by Supreme Court that in the case of each and every selection the marks allocated for the viva voce test shall not exceed 12.2 per cent of the total marks taken into account for the purpose of selection. According to the learned counsel, it would be in each case that determination shall have to be made by the Court as to what should be the percentage of marks for interview.

13. On the contention of the learned counsel the parties what has to be first found out is—whether the Supreme Court in Ashok Kumar Yadav's case (supra) has ruled that in every service where examination consists of a written examination followed by a viva voce test, the marks for viva voce shall in no case exceed 12.2 per cent of the total marks taken into account for the purpose of selection. In order to find out



correct answer, it would be appropriate to make a detailed reference to the judgement in Ashok Kumar Yadav's case (1986 Lab IC 1417) (supra).

11. "The facts of that case were that sometime in October 1980 the Haryana Public Service Commission invited applications for recruitment to 61 posts in Haryana Civil Service (Executive) and other Allied Services. The procedure for recruitment was governed by the Punjab Civil Service (Executive Bench) Rules, 1930, as applicable to the State of Haryana. Rule 9 (1) of those provided that a competitive examination shall be held at any place in Haryana in each year in or about the month of January for the purpose of selection by competition of as many candidates for the Haryana Civil Service (Executive) and other Allied Services as the Governor of Haryana may determine and such competitive examination shall be held in accordance with the regulations contained in Appendix to the Rules. Rule 10 laid down the conditions for eligibility to appear at the competitive examination. Regulation 1 in Appendix I provided that the competitive examination shall include compulsory and optional subjects and every candidate shall take all the compulsory subjects and not more than three of the optional subjects, provided that ex-servicemen shall not be required to appear in the optional subjects. The compulsory subjects included English Essay, Hindi, Hindi Essay and General knowledge carrying in the aggregate 403 marks and there was also viva voce examination which was

compulsory and each carried 100 marks. In response to the advertisement issued by the Haryana Public Service Commission about 6000 candidates applied for recruitment and appeared in the written examination held by the Commission. Out of about 6000 candidates who appeared in the written examination, over 1300 obtained more than 45 per cent marks and thus qualified for being called for interview for the viva voce examination. The Commission invited all the 1300 and more candidates who qualified for the viva voce test, for interview. It seems that though originally applications were invited for recruitment to 61 posts the number of vacancies rose during the time taken up in the written examination and the viva voce test and ultimately 119 posts became available for being filled and on the basis of the total marks obtained in the written examination as well as viva voce test 119 candidates were selected and recommended by the Commission to the State Government. It seems that there were some candidates who had obtained very high marks at the written examination but owing to rather poor marks obtained by them in the viva voce test, they could not come within the first 119 candidates and they were consequently not selected. They were aggrieved by the selection made by the Commission and some out of them challenged the validity of the selection by filing a writ petition in this Court on several grounds. One of the points raised in that case was that in comparison to the marks allocated to the written examination, the proportion



of the marks allocated to the viva voce test was excessively high and that introduced an irredeemable element of arbitrariness in the selection process so as to offend Art. 14 and 16 of the constitution. While dealing with this question, Bhagwati, J. (as his Lordship then was) now Chief Justice, first made reference to certain observations made in the judgement of the Supreme Court in *Lila Dhar v. State of Rajasthan*, AIR 1981 SC 1977 thus :

“23. This Court speaking through Chinnappa Reddy, J. pointed out in *Lila Dhar v. State of Rajasthan* that the object of any process of selection for entry into public service is to secure the best and the most suitable person for the job, avoiding patronage and favouritism. Selection based on merit, tested impartially and objectively, is the essential foundation of any useful and efficient public service. So open competitive examination has come to be accepted almost universally as the gateway to public services. But the question is how should the competitive examination be devised ? The competitive examination may be based exclusively on written examination or it may be based exclusively on oral interview or it may be a mixture of both. It is entirely for the Government to decide what kind of competitive examination would be appropriate in a given case. To quote the words of Chinnappa Reddy, J. “In the very nature of things it would not be within the province or even the competence of the Court and the Court would not venture

into such exclusive thickets to discover ways out, when the matters are more appropriately left” to the wisdom of experts. It is not for the Court to lay down whether interview test should be held at all how many marks must be minimum so as to avoid charges of arbitrariness, but not necessarily always. There may be posts and appointments where the only proper method of selection may be by viva voce test. Even in the case of admission to higher degree courses, it may sometimes be necessary to allow a fairly high percentage of marks for the viva voce test. That is why rigid rules cannot be laid down in these matters by Courts. The experts and bodies are generally the best judges. The Government aided by experts in the field may appropriately decide to have a written examination followed by a viva voce test.”

Thereafter, reference has been made to the book *Public Personnel Administration* by Glenn Stahl and also to the judgement of the Supreme Court in *Aja Hasia v. Khalid Mujib*, AIR 1981 SC 487 for the purpose of elucidating the advantages and disadvantages of a viva voce test. Thereafter the learned Judge proceeded to consider whether the allocation of as high a percentage of marks as 30.3 per cent in the case of ex-Ser vice officers and 22.2 per cent in the case of other candidates for the viva voce test renders the selection process arbitrary. Again, while considering this aspect, reference was made to the Kothari Committee Report and also to the fact that on the basis of that report



the percentage of marks allocated to the viva voce test in the competitive examination for the Indian Administrative Service and other Allied Services was brought down still further to 12.2 per cent. In the light of this discussion, it was ultimately found that the allocation of 22.2 per cent of the total marks for the viva voce test infected the selection process with the vice of arbitrariness.

12. After arriving at the aforesaid finding, the next question that was posed for consideration was—as to what should the proper percentage of marks to be allocated for the viva voce test in both these cases i. e. in case of ex-service officers and in case of other candidates. Taking into consideration the percentage adopted by the Union Public Service Commission in case of selections to the Indian Administrative Service and other Allied Services, a direction was issued that hereafter in case of selections to be made to the Haryana Civil Services (Executive Branch) and other Allied Services, where the competitive examination consists of a written examination followed by a viva voce test, the marks allocated for the viva voce test shall not exceed 12.2 per cent of the total marks taken into account for the purpose of selection. It was further suggested that this percentage should also be adopted by the Public Service Commission in other States because it is desirable that there should be uniformity in the selection process throughout the country and the practice followed by the Union Public Service

Commission should be taken as a guide for the State Public Service Commission to adopt and follow. The percentage of marks allocated for the viva voce test in case of ex-service officers was kept at 25 per cent.

13. Now, as I look at the judgement of the Supreme Court in Ashok Kumar Yadav's case (1986 Lab C 1417) (supra) I find that the determination of the percentage of marks for a viva voce test at 12.2 per cent relates only to the Haryana Civil Services (Executive Branch) and other Allied Services and that percentage for viva voce test cannot apply to the percentage of the viva voce test in the instant case. Reference to 'other allied Services' in the judgement means those services for which the examination was held by the Commission on the basis of the Punjab Civil Service (Executive Branch) Rules, 1930. I do not agree with Mr. Malik, learned counsel for the petitioners, that by using the words, 'other Allied Services' their Lordships of the Supreme Court were intending to lay down the percentage of viva voce test with regard to all Services in the State. In para 25 of Ashok Kumar Yadav's case (supra) Bhagwati, J. (now the learned Chief Justice) speaking for the Court, has observed thus :

"There cannot be any hard and fast rule regarding the precise weight be given to the viva voce test as against the written examination. It must vary from service to service according to the requirement of the service, the minimum qualification prescribed, the age group from which the selection is to be



made, the body to which the task of holding the viva voce test is proposed to be entrusted and a host of other factors. It is essentially a matter of determination by experts. The Court does not possess the necessary equipment and it would not be right for the Court to pronounce upon it, unless to use the words of Chinnappa Reddy, J. in Lila Dhar's case "exaggerated weight has been given with proven or obvious oblique motives".

From the aforesaid observations our view finds full support that the percentage of marks determined for viva voce test was only for the examination held by the Commission on the basis of the Punjab Civil Service (Executive Branch) Rules, 1930; otherwise the aforesaid observations would become meaningless. To emphasize on the basis of the aforesaid observations, the weight to be given to the viva voce test as against the written examination, must vary from service to service according to the requirement of the service, the minimum qualification prescribed, the age group from which the selection is to be made, the body to which the task of holding the viva voce test is proposed to be entrusted and a host of other factors.

14. Moreover, if the contention of the learned counsel for the petitioner is accepted to be correct, then a fortiori it would have to be held that the view enunciated by the Supreme Court in Lila Dhar's case (AIR 1981 SC 1777) (supra) is not correct. In that case, the service in question was Rajasthan Judicial Service. In pursuance to the

Rules of that Service, a competitive examination for recruitment of Munsifs was held. The Competitive examination consisted of a written examination with two papers in Law carrying 100 marks each and two papers one in Hindi and the other in English each carrying 100 marks and a viva voce examination carrying 100 marks. After the declaration of the result of the competitive examination, a writ petition was filed by an unsuccessful candidate who had obtained a total of 189 marks, 159 in the written test and 30 in the viva voce, against one of the points raised in that writ petition was that the entire selection was vitiated by the allocation of 12.2 per cent of the total marks for the viva voce examination. The learned Judge dealt with that point in depth on the basis of the judicial decisions, the report of the Kothari Committee and the book by Glenn Stahl on 'Public Personnel Administration' and found that the marks allocated for interview were not excessive. Now this decision in Lila Dhar's case (supra) has neither been distinguished nor dissented from. If the percentage for all Services has to be taken at 12.2 per cent, as was sought to be urged in the light of Ashok Kumar Yadav's case (1986 Lab IC 1417) (supra), then certainly the view enunciated in Lila Dhar's case (supra) has to be overruled, but this was not done; rather quotations from that case are to be urged in the light of Ashok Kumar Yadav's case (1986 Lab-IC 1417) (supra), then certainly the view enunciated in Lila Dhar's case (supra) had to



**P. C. Jain**  
**Judge**  
**P. & H. High Court**

er ruled, but this was not done ;  
 other quotations from that judge-  
 ment have approvingly been quoted  
 and as earlier observed in para 25 of  
 the report it has clearly been held that  
 no hard and fast rule can be laid down  
 and that the precise weight to be given  
 to the viva voce test as against the writ-  
 ten examination must vary from service  
 to service. At this stage. I may advert  
 to the unreported decision of this Court  
 in Civil Writ Petition No 4777 of 1985  
 in *Ukhdev Singh Nirman v. The State of*  
*Punjab*) decided on February 21, 1986  
 the correctness of which was doubted  
 by the Bench while making the present  
 reference. It may straightway be obser-  
 ved that an argument about allotting 35  
 per cent marks for interview was casua-  
 lly raised and the same was disposed of  
 without much discussion. Hence that  
 judgement has to be confined only to the  
 facts of that case and cannot be taken  
 as a precedent on the point raised be-  
 fore us.

15. In view of the aforesaid discus-  
 sion, the only conclusion that can be  
 arrived at is that on the basis of the de-  
 cision in *Ashok Kumar Yadav's case*  
*(supra)* it cannot be held that with regard  
 to each and every Service including the  
 posts of Taxation Inspectors in the State  
 of Haryana where both written and viva  
 voce examination is prescribed only 12.2  
 per cent marks had to be assigned for  
 the viva voce test.

16. This brings us to the next ques-  
 tion whether the marks allocated for  
 viva voce which came to 28.5 per cent  
 are on the higher side ? What had been

argued by Mr. Malik, learned counsel for  
 the petitioners, was that in comparison  
 to the marks allocated to the written exa-  
 mination, the proportion of the marks  
 allocated to the viva voce test was exces-  
 sively high and that introduced an irre-  
 deemable element of arbitrariness in the  
 selection process.

17. We have heard the learned  
 counsel for the parties and find that in  
 the instant case the petitioners have  
 not supplied any material nor have  
 furnished any data in support of this  
 plea. As would be evident from the ten-  
 or of the petition, the whole case of the  
 petitioners is based mainly on the plea  
 that in *Ashok Kumar Yadav's case* (1986  
 Lab IC 1417) (*supra*), a direction had  
 been given by the Supreme Court to  
 keep the percentage of viva voce marks  
 at 12.2 ; but in spite of that direction a  
 higher percentage at 28.5 has been kept,  
 with a view to accommodate those can-  
 didates in whom the Board members  
 were interested. On this aspect, we  
 have already held that *Ashok Kumar*  
*Yadav's case* (1986 Lab IC 1417) cannot  
 be read to mean that the percentage of  
 viva voce marks indicated therein is to  
 apply to all the services in the State of  
 Haryana. That being so, it was incum-  
 bent upon the petitioners to indepen-  
 dently show that for the service in ques-  
 tion providing of 28.5% marks for viva  
 voce test was excessive. Open compe-  
 titive examination has come to be accep-  
 ted almost universally as the gateway  
 to public service. As to how should the  
 competitive examination be devised  
 Bhagwati J (now the learned Chief Jus-  
 tice) in *Ashok Kumar Yadav's case*



(supra) has analysed the matter thus :—

“The competitive examination may be based exclusively on written examination or it may be based exclusively on oral interview or it may be a mixture of both. It is entirely for the Government to decide what kind of competitive examination would be appropriate in a given case. To quote the words of Chinnappa Reddy, J. “In the very nature of things it would not be within the province or even the competence of the Court and the Court would not venture into such exclusive thickets to discover ways out, when the matters are more appropriately left” to the wisdom of the experts. It is not for the Court to lay down whether interview test should be held at all or how many marks should be allowed for the interview test. Of course the marks must be minimal so as to avoid charged of arbitrariness, but not necessarily always. There may be posts and appointments where the only proper method of selection may be by a viva voce test. Even in the case of admission to higher degree courses, it may sometimes be necessary to allow a fairly high percentage of marks for the viva voce test, that is why rigid rules cannot be laid down in these matters by Courts. The expert bodies are generally the best judges. The Government aided by experts in the field may appropriately decide to have a written examination followed by a viva voce test.”

It has already been noticed earlier that there cannot be any hard and fast

rule regarding the precise weight to be given to the viva voce test as against written examination. It must vary from service to service according to the requirement of the service, the minimum qualification prescribed ; the group from which the selection is to be made, the body to which the task is being entrusted, holding the viva voce test is proposed to be entrusted and a host of other factors. As earlier observed, the persons have not placed any material on the record to facilitate the recording of a finding in their favour. On the basis of conjectures, it is not only difficult, it would also be improper to strike down the marks allocated for viva voce test, holding that they are excessive. Consequently, the contention of the learned counsel is negatived.

18. It was lastly contended by Mr. Malik that in *Ashok Kumar Yadav v. State of Bihar* (1986 Lab IC 1417) (supra), it has been ruled that where there is a composite test consisting of a written examination followed by viva voce test, the number of candidates to be called for interview in order of the marks obtained in the written examination, should not exceed twice or at the highest thrice the number of vacancies to be filled, but in the instant case there were only 16 vacancies and the Board called for interview 494 candidates, which came to 31 times of the vacancies to be filled. That the selection being contrary to the direction of the Supreme Court, was liable to be quashed.

19. On giving our thoughtful consideration to the entire matter,



the circumstances of the case, we find no merit in this contention of the learned counsel. In the petition, it is stated that the candidates were called for 29 vacancies. In the written statement, it has been averred that respondent No. 2 had sent a revised demand to respondent No. 3 on 4th July, 1985 for 79 candidates of different categories, that against the demand the Board had recommended 49 candidates in the month of January, 1986, that a large number of candidates were called for interview and that fact by itself does not vitiate the selection. There can be no gainsaying that if the original demand is kept in view then the number of candidates called for interview comes to 16 times and if the revised demand is kept in view then it comes to 6 times. Be that as it may, the fact remains that the number of candidates called for interview was much higher than the standard laid in Ashok Kumar Yadav's case (supra). In this view of the matter, the question that arises for determination is whether this fact alone should invalidate the entire selection made by the Board. A similar situation had arisen in Ashok Kumar Yadav's case (1986 Lab IC 1417), where candidates representing more than 20 times the number of available vacancies were called for interview. But after going into the merits of the case, it was observed that suspicion in one's mind that some element of arbitrariness might have entered the

assessment in the viva voce examination cannot take the place of proof and a selection cannot be struck down on the ground that the evaluation of the marks of the candidates in the viva voce examination might be arbitrary. In view of this finding, the selection was not struck down irrespective of the fact that a firm finding was recorded that calling of such a high number was not the right course to follow. Therefore, the petitioner in the instant case had positively to prove that the marking done by the Board was plainly and indubitable arbitrary or affected by oblique motives. It is only if the assessment is patently arbitrary or the risk of arbitrariness is so high that a reasonable person would regard arbitrariness as inevitable, that the assessment of marks at the viva voce test may be regarded as suffering from the vice of arbitrariness. But again the petitioners have miserably failed to supply any material or furnish a convincing date in support of their case. In this view of the matter, the contention of the learned counsel, as earlier observed, merits rejection.

20. No other point arises for consideration.

21. For the reasons recorded above, the writ petitions being without any merit, fail and are dismissed. In the circumstances of the case, we make no order as to costs.

petitions dismissed.



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### OBSERVATION

**Constitution of India, Art. 32, Sch. 2 Part D, Cl. 9 (1) (c) —Mandamus—**  
**Retiring Judge of a High Court becoming, Chairman of Administrative Tribunal**  
**Retiring as High Court Judge, but continuing as Chairman —As per terms of**  
**service his salary was not to exceed Rs. 3500/- including his pension Deduc-**  
**tion of Rs. 170/- from his salary towards recovery of pension equivalent of**  
**statute Sch 2 part D Cl. 9 (1) (c) held, not applicable Deduction found to be**  
**illegal—Mandamus issued to Central Government directing forthwith pay-**  
**ment of amount so recovered along with costs of Rs. 3000/- of the writ petit-**  
**n. (High Court Judges (Conditions of Service) Act (28 of 1954), S. 17 (A) (3) (1).**

### OBSERVED BY

Mr. Amarendra Nath Sen and Mr. Ranganath Misra  
 Hon'ble Judges, Supreme Court of India

### IN

Writ Petn. No. 1015 decided on 16-9-1985 in the case of Shiveshwar Prasad Sinha,  
 petitioner v. Union of India and others, Respondents.

### TEXT

**ORDER :** —The petitioner was a  
 sitting Judge of the Patna High Court  
 when he became the Chairman of the  
 Andhra Pradesh Administrative Tribunal  
 Hyderabad. He attained the age of  
 60 on 1-2-80 and ceased to be a Judge of  
 the High Court but continued to be the  
 Chairman of the said Tribunal until  
 1-11-81, when on grounds of health,  
 he resigned. Under the High Court  
 Judges (Conditions of Service) Act, 1954  
 as amended in 1976, the petitioner was  
 entitled to gratuity of Rs.  
 6,666.67 and after adjusting certain  
 amounts to be recovered, he was actually  
 paid a sum of Rs. 7,302.02 as retirement  
 gratuity, calculated on the basis of S.  
 17(A)(3) (i) of the said Act. On 14-12-78

the Government of India in the Minis-  
 try of Home Affairs laid down the terms  
 and conditions of service of the Chair-  
 man and the members of the Andhra  
 Pradesh Administrative Tribunal, Annex-  
 ure B to the counter-affidavit filed in  
 this Court indicates those terms so far  
 as the Chairman is concerned. The pre-  
 scription therein was to the following  
 effect :

“In partial modifications of the  
 terms and conditions of service of the  
 Chairman and Members of the Andhra  
 Pradesh Administrative Tribunal as  
 contained in para 2 of this Ministry's  
 letter.....dated the 6th July, 1976 the  
 Central Government hereby determine



under Para 3 (6) of Andhra Pradesh Administrative Tribunal (sic), 1976 the following terms and conditions of service for the Chairman and Members of the Tribunal as from 3rd August 1978 :

Chairman—The same remuneration allowances and conditions of service as admissible to a High Court Judge provided that on retirement as a Judge, the pay plus pension and pension equivalent of other retirement benefits, if any, shall not exceed Rs. 3,500/-."

2. On retirement from the High Court, the petitioner's pension was fixed at Rs. 1067/- per month and he was to be paid, while working as Chairman, salary on the basis of the difference between Rs. 3500/- and the pension. The petitioner was, however, paid monthly salary at the rate of Rs. 2263/- and a sum of Rs. 170/- was withheld from the salary. The petitioner maintained that he was entitled to be paid Rs. 3,500/- and, therefore, the difference between that sum and the amount fixed as pension would be the salary to which he would be entitled. When no heed was paid to his demand he was obliged to approach this Court for a writ of mandamus or appropriate direction.

3. Two counter-affidavits have been filed by the Director of Audits and Accounts to justify the claim for deduction of Rs. 170/- per month on the basis of pension equivalent of gratuity.

4. At the hearing Mr. Sen appealing for the respondents has not been able to lay his hands on statutory provision which would authorise such a deduction as pointed out earlier. The gratuity is payable under S. 17 of the High Court Judges (Conditions of Service) Act, 1954, as amended by Act No. 35 of 1976. It is conceded by Mr. Sen that in case the petitioner was not re-employed after 1-2-80, when he retired as a Judge, no recovery was to be made from his pension. The petitioner continued to be Chairman of the Tribunal till he retired on the basis of re-employment and re-employment was covered by the terms indicated in annexure B which we have extracted above. It is conceded by Mr. Sen that the re-employment was contractual and the terms of the contract indicated that the petitioner was entitled to salary not exceeding Rs. 3,500/-. The petitioner has not claimed anything beyond Rs. 3,500/- including the pension and according to him after deducting the pension of Rs. 1,067/- per month he is entitled to the balance sum of Rs. 2,433/- and out of that the sum of Rs. 170/- as pension equivalent of gratuity is not deductible every month. Mr. Sen drew inspiration for the action taken in recovering Rs. 170/- per month by laying his hands on the provisions contained in Clause 9 (1) (c) of Part D of Schedule 11 of the Constitution. That provision relates to the Judges of the Supreme Court and the particular provision indicate that if a Judge of the Supreme Court has



**Ranganath Misra**  
**Judge**  
**Supreme Court of India**

When a Judge of the High Court previously and before appointment as a Judge of the Supreme Court if he had received a retirement gratuity in respect of previous service, his salary has to be reduced by the pension equivalent of gratuity. This is absolutely on the basis that the retirement has come to an end when the Judge of the High Court has become a Judge of the Supreme Court. The provisions therein for the principle underlying the provision can have no application to a case of this type where the Judge has retired and he undertakes a different service on contractual basis.

5. We are satisfied that there is absolutely no justification for directing recovery of the pension equivalent of gratuity at the rate of Rs. 170/ per month. In fact, this amount appears to have been arbitrarily fixed. If the Judge had to be subjected to such a deduction, the entire gratuity was to be taken into account and it could not be confined to the sum paid to him as gratuity after deduction or adjustment. There could be a case where the entire gratuity had been adjusted against existing dues to be recovered and, there-

fore, nothing was paid in cash at the time of retirement. In such a case there would be no scope to demand any adjustment by way of pension equivalent of gratuity accepting the manner in which it has been done here. The method adopted will have the effect of serving the Judge if the amount of gratuity to which he is lawfully and legitimately entitled.

6. We are, therefore, satisfied that the action of the respondents was without any foundation in law and the petitioner has been unnecessarily harassed over such a triffling matter. Several representations made by him went unheeded and he was obliged to come before this Court. We direct the respondents to forthwith, and at any rate not beyond 30 days from today, to pay all the dues of the petitioner (which he has calculated at Rs. 3,743/-) without any recovery of pension equivalent of gratuity. The petitioner shall be further entitled to the costs of this petition which we assess at Rs. 3,000/-. This amount shall also be paid along with other dues of the petitioner within the time indicated above.

Petition allowed.



Report No 11 p 04

IT IS THE ESSENCE OF DEMOCRACY  
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## OBSERVATION

(A) **Disciplinary Action—Central Industrial Security Force Act (50 of 1968), S. 22 Central Industrial Security Force Rules (1969), Rs. 37 (b) - Dispensation of enquiry** Members of unit resorting to large scale absenteeism from duty and parade Also, disobeying orders of superiors and abusing them in filthy language - Dispensation with enquiry—Proper (Constitution of India, Art 311 (2)).

(B) **Disciplinary Action—Central Industrial Security Force Act (50 of 1968), S.22 —Central Industrial Security Force Rules (1969), R. 35 (b) --Dispensation of enquiry -Delinquent members of unit holding clandestine meetings in collaboration with certain dismissed members and deciding that efforts be made to restart agitation on wide scale in all units of Southern Zone for forming Association—Dismissals in question made to prevent possible recurrence of near mutiny units posted in Southern Zone -Orders of dismissal expressly stating that witnesses were being threatened and intimidated from coming forward to give evidence and charge-sheets could not be served in spite of efforts to serve charge-sheets Dispensation of enquiry was proper. (Constitution of India, Art. 311 (2)).**

(C) **Appointing and dismissal authorities -Appointment by Inspector General of Police -Dismissal by Commandant -It is not dismissal by authority subordinate to appointing authority—Constitution of India, Art. 311 (1) -Central Industrial Security Force Act (1968), S. 22—Central Industrial Security Force Rules (1969), R. 3 -**

## OBSERVED BY

Mr. A. P. Sen and Mr. D. P. Madon  
 Hon'ble Judges, Supreme Court of India

## IN

Transferred Cases Nos 2 to 7 of 1983 decided on 31-10-1985 in the case of A. K. Sen, etc Petitioners v. Union of India and another, etc., Respondents.

## TEXT

Madon J. :—Six security guards belonging to the Central Industrial Security Force (hereinafter referred to as "the Force") were dismissed from service by dispensing with the disciplinary inquiry under Clause (b) of Rule 37 of the Central Industrial Security Force Rules, 1969,

read with Clause (b) of the second proviso to Article 311 (2) of the Constitution. These provisions authorize a disciplinary authority to dispense with a disciplinary inquiry where it is satisfied, for some reason to be recorded in writing, that it is not reasonably practicable to



hold the inquiry. The dismissed security guards filed writ petitions under Art. 226 of the Constitution in the Kerala High Court challenging their dismissal. These petitions were transferred to this Court under Art. 139A (1) of the Constitution as a number of other matters involving the interpretation of the second proviso to Art. 311 (2) were pending in this Court. These other matters were disposed of by a Constitution Bench of this Court by a common judgement, namely, *Union of India v. Tulsiram Patel* (1985) 3 SCC 398.

2. The question which falls for determination in these Transferred Cases is whether it was not reasonably practicable to hold a disciplinary inquiry against the petitioners. In *Tulsiram Patel's* Case this Court has in great detail considered the scope and applicability of Clause (b) of the second proviso to Art. 311 (2) and has given illustrative cases where a disciplinary inquiry can be said to be not reasonably practicable. It is in the light of what was held in the majority judgment in that case that the present cases before us fall to be decided.

3. Some of the matters before the Court in *Tulsiram Patel* case (AIR 1985 SC 1416) related to the Force, and the nature, functions and duties of the members of the Force have been set out and discussed in that judgment and need not be repeated here. Suffice it to say that the Force has been constituted under the Central Industrial Security Force Act, 1968, for the better protection and security of industrial undertakings owned

by the Government and of industrial undertakings and installations attached thereto or undertakings in the public sector which may request for such protection and security. It is an armed Force and as shown by the various provisions of the said Act, the maintenance of discipline in the Force is of vital importance. In March 1979 the members of the unit of the Force stationed at Bokaro Steel Plant at Bokaro in the State of Bihar formed an All-India Association and began to agitate for its recognition as also for grant of several demands. From May 1979 onwards the agitation assumed a serious form resulting in the total break-down of discipline, and insubordination ran rampant. There was large-scale abstention from duty and parade, orders of superior officers were disobeyed and flouted, and superior officers were abused in filthy and obscene language. There were dharnas and gheraos of superior officers. Processions were taken out in which slogans both defiant and throwing out a challenge to the authorities were shouted. The situation at Bokaro ultimately became so grave that the army had to be called out to disarm the unit posted there and this could only be achieved after a pitched armed battle which lasted for three hours between the armed agitators and the army resulting in twenty-two deaths, among them of an army major and two other army personnel. Several members of the Force of the Bokaro Unit were dismissed in the same way as the petitioners before us. Their cases fell to be decided in *Tulsiram Patel* Case and on a consideration of the detailed



materials placed before the Court in those case, their orders of dismissal were upheld. Apart from calling out the army, similar occurrences took place at Hoshangabad in the State of Madhya Pradesh. The dismissal of a security guard posted at Hoshangabad in similar circumstances was also upheld by the Constitution Bench in *Tulsiram Patel* case. In all those cases the Constitution Bench held that "no person with any reason or sense of responsibility can say that in such a situation the holding of an inquiry was reasonable".

4. The situation in the southern zone was very similar. Ultimately, our security guards belonging to the unit of the Force posted at Thumba in the Trivandrum Division who are petitioners in Transferred Cases Nos 4 to 7 of 1983 and two security guards belonging to the unit posted at Eloor, Alwaye, among the petitioners in Transferred Cases Nos. 2 to 3 of 1983, were dismissed in the manner aforesaid. The materials on the record show that the facts of misconduct charged against the petitioners in Transferred Case Nos. 4 to 7 of 1983 were the same as were before the Court in *Tulsiram Patel* case (AIR 1985 SC 1416) and the situation which prevailed was very similar.

5. So far as Transferred Cases Nos. 2 and 3 of 1983 are concerned, the materials on the record show that at Eloor also the situation was the same but ultimately it turned to normal in June 1980. However, efforts were made in October 1980

to revive the agitation and clandestine meetings were held at village Kulathur-Trivandrum, on October 6 and 7, 1980, in which it was decided that efforts should be made to restart the agitation on a wide scale in all the units of the southern zone. These meetings were held by the petitioners in Transferred Cases Nos. 2 and 3 of 1983 in collaboration with some of the dismissed members of the Force. In order to prevent the possible reoccurrence of a near mutiny by the units posted in the southern zone, swift and deterrent action was necessary and required and these two petitioners were dismissed. The result was that the agitation did not start again in the southern zone.

6. All the impugned orders of dismissal before us expressly state that the witnesses were being threatened and intimidated from coming forward to give evidence and that attempts were made to serve the charge-sheets but that the charge sheets could not be served. In these circumstances, we can only repeat what was said by the Constitution Bench in *Tulsiram Patel* case (AIR 1285 SC 1416) that no person with any reason or sense of responsibility can say that in such a situation the holding of an inquiry was reasonably practicable. Several of the petitioners before us went in departmental appeal and those appeals were also rejected and, in our opinion, rightly rejected.

7. An additional point has been raised in Transferred Cases Nos. 2 and



3 of 1983 that the orders of dismissal were passed by an authority subordinate to the authority by which the said petitioners were appointed and, therefore, the provisions or Clause (1) of Article 311 of the Constitution were violated. The petitioner in Transferred Case No. 2 of 1983 was appointed on August 8, 1972, and the petitioner in Transferred Case No. 3 of 1983 was appointed on December 30, 1974, by the Assistant Inspector-General. In both these cases the orders of dismissal were passed by the Commandant of their unit. It was submitted that the very designation showed that the Commandant was subordinate to the Assistant Inspector-General. The composition of the Force is set out in Rule 3 of the Central Industrial Security Force Rules, 1969, Rule 3 as it stood gave the rankings as (1) Inspector-General, (2) Deputy Inspector-General, (3) Commandant (Chief Security Officer). The Assistant Inspector-General did not feature in the said Rule. This post was obviously created some time before August 30, 1972, on which date the petitioner in Transferred Case No. 2 was appointed. These petitioners have not produced any material to show when and how this post was created or what was the ranking given to the Assistant Inspector-General vis-a-vis the Commandant at that time. However at the hearing of these Transferred

Cases, the respondents produced a letter dated May 29, 1969, from Deputy Secretary to the Government of India, Ministry of Home Affairs, addressed to the Inspector-General of the Force conveying the sanction of the President of India to the creation of certain post in the Force. Among the posts so sanctioned was the post of Assistant Inspector-General who was ranked along with Commandant. Further, Rule 3 was substituted in 1972. The substituted Rule 3 shows that the Assistant Inspector-General/Principal Training Colleges/Commandant (Fire) /Commandant (Chief Security Officer) all rank equally. This contention must therefore, equally fail.

8. In the result, these Transferred Cases are dismissed.

There will be no order as to the costs of these cases.

9. In conclusion, we may mention that as the petitioners were not represented in this Court, we requested Dr. Y. S. Chitale Senior Advocate, to appear as amicus curiae so that no point which might be in favour of the petitioners may remain to be brought to the notice of the Court and we are much beholden to Dr. Chitale for the assistance which he has rendered to this Court in the course of the hearing of these Cases.

Transferred Cases dismissed



## OBSERVATION

**Indian Administrative Service (Regulation of Seniority) Rules (1954, R. 3 (b)—Indian Administrative Service (Cadre) Rules (1954), R. 9—Year of allotment—Promotion of non-cadre officer to cadre post under R. 9 by State Govt. for period exceeding six months—His continuous period of officiation in senior post has to be taken into consideration in reckoning year of allotment. Constitution of India, Art. 309, 311 ; Indian Administrative Service (pay) Rules 1954 Sch. II S. III Cl. 1, Proviso ; Indian Administrative Service (Recruitment) Rules 1954, Rr. 78)**

## OBSERVED BY

Mr. A. P. Sen and

Mr. D. P. Madon

Hon'ble Judges, Supreme Court of India

## IN

Civil Appeals Nos. 5040-5044 and 5045 of 1985 decided on 19-11-1985, in the case of Union of India, Appellant v. G. N. Tiwari and others, Respondents.

And

Union of India and others, Appellants v. K. L. Jain, Respondent.

## TEXT

A. P. Sen, J. :— After hearing learned counsel for the parties, we had by our order dated October 11, 1985 dismissed these appeals. We now proceed to give the reasons therefor.

2. These appeals by special leave directed against the judgement and orders of the Madhya Pradesh High Court dated September 9, 1983 and December 16, 1983 raise a question as to whether a member of the State Civil Service (Executive) on his temporary appointment by the State Government under R. 9 of the Indian Administrative Service (Cadre) Rules, 1954 for a period exceeding six months, is entitled to have

his continuous period of officiation in a senior post, to be taken into account in reckoning the 'year of allotment' under R. 3 (3) (b) of the Indian Administrative Service (Regulation of Seniority) Rules, 1954. That depends on whether prior approval of the Central Government or the Union Public Service Commission to such appointment under sub r. (2) of R. 9 of the Cadre Rules for the appointment of a non-cadre officer to a cadre post by the State Government is a condition precedent for a valid appointment under R. 9 of the Cadre Rules. Further, the question is whether the existence of a vacancy in



the cadre strength of promotees, i. e. over-utilization of the State Deputation Reserve Quota is a relevant factor to be taken into consideration in determining the period of continuous officiation in a senior post on the cadre till the Central Government accords its approval to such appointment under R. 9 of the Cadre Rules in assigning the year of allotment under R. 3 (3) (b) of the Seniority Rules.

3. Facts in these cases are more or less similar. It will suffice for our purposes first to state the facts in K. L. Jain's case. The respondent was a substantive member of the State Civil Service (Executive) in the State of Madhya Pradesh. He was on November 7, 1975 temporarily appointed by the State Government to the post of a Collector which is a senior post on the cadre under R. 9 of the Indian Administrative Service (Cadre) Rules, 1954 and had been continuously officiating on such post w. e. f. November 10, 1975 till the Central Government accorded its approval on October 1, 1976, for his appointment in the Indian Administrative Service. The promotion quota of non cadre officers to cadre posts was 50 prior to October 1, 1976 but was on that date increased to 56. The respondent was formally appointed to the Indian Administrative Service by the Central Government on December 7, 1976. The State Government of Madhya Pradesh by letter dated February 3, 1979 informed the respondent he was assigned 1972 as the year of allotment by the Central Government. Feeling aggrieved the respondent filed a petition before the High Court under Art. 226 of the Constitution for an appropriate writ, direction or order, directing that he should instead be assigned 1971 as his year of allotment under R. 3 (3) (b) of the Seniority Rules and his seniority should be fixed on that basis, and that on re-fixation of his seniority he be allowed the consequential reliefs to which he may be entitled.

4. The appellant contested the respondent's claim on three grounds, namely : (i) he was not entitled to count his continuous officiation in the senior post of Collector from November 10, 1975 as his appointment to such post in the cadre was not approved by the Central Government till October 1, 1976, i. e. for any period prior to October 1, 1976 ; (ii) there was no vacancy in the cadre strength of promotees for a period prior to October 1, 1976 and therefore the appointment of the respondent to the post of Collector for the period from November 10, 1975 to September 30, 1976 had to be ignored ; and (iii) there was over utilization of the State Deputation Reserve Quota and for that reason also his continuous officiation in the senior post of a Collector could not be taken into account.

5. G. P. Singh, C. J. speaking for himself and Faizanudding J., in K. L. Jain v. Union of India, 1984 M. P. L. 284 : (1984 Lab IC 374) held that though there was no specific approval of the Central Government to the appointment of the respondent, such prior approval was not a condition precedent for

6. The respondent's claim was based on the fact that he was appointed to the post of Collector in the cadre of the State Civil Service (Executive) on November 7, 1975 and had been continuously officiating on such post w. e. f. November 10, 1975 till the Central Government accorded its approval on October 1, 1976, for his appointment in the Indian Administrative Service. The promotion quota of non cadre officers to cadre posts was 50 prior to October 1, 1976 but was on that date increased to 56. The respondent was formally appointed to the Indian Administrative Service by the Central Government on December 7, 1976. The State Government of Madhya Pradesh by letter dated February 3, 1979 informed the respondent he was assigned 1972 as the year of allotment by the Central Government. Feeling aggrieved the respondent filed a petition before the High Court under Art. 226 of the Constitution for an appropriate writ, direction or order, directing that he should instead be assigned 1971 as his year of allotment under R. 3 (3) (b) of the Seniority Rules and his seniority should be fixed on that basis, and that on re-fixation of his seniority he be allowed the consequential reliefs to which he may be entitled.



**A. P. Sen****Judge****Supreme Court of India**

a valid appointment to a cadre under R. 9 of the Cadre Rules and therefore the continuous officiation by the respondent as the Collector for the period from November 10, 1975 to September 30, 1976 could not be ignored on the ground that the appointment was not specifically approved by the Central Government. Further, it was held that the existence of a vacancy in the promotion quota of cadre officers was not a condition pre-requisite for making an appointment of a non-cadre officer to a cadre post under R. 9 of the Cadre Rules and therefore, merely that there was over-utilization of the State Deputation Reserve Quota had no bearing on the question of the validity of the appointment of the respondent on a cadre post. It also held that the condition of approval by the Central Government required by the proviso to cl. (1) of S. III of Schedule II of the Indian Administrative Service (Pay) Rules, 1954 was only for pay fixation and it had nothing to do with the validity of the officiation of a non-cadre officer in cadre post under R. 9 of the Cadre Rules. It, accordingly, allowed the writ petition filed by the respondent and held that his continuous officiation in a senior post of Collector from November 10, 1975 was in accordance with R. 9 of the Cadre Rules and the same must ensure for his benefit to give him seniority under R. 3 (3) (b) of the Seniority Rules.

6. In the connected case, G. N. Tiwari and 19 other members of the Madhya Pradesh cadre of the Indian Administrative Service who had simi-

larly been deprived of the benefit of their continuous officiation on their temporary appointment to the cadre post of a Collector by the State Government under R. 9 of the Cadre Rules and had been assigned the year 1967 instead of 1966, the year 1968 instead of 1967, or the year 1972 instead of 1971 as the year of allotment under R. 3 (3) (b) of the seniority Rules also moved the High Court by a petition under Art. 226 of the Constitution based on the same grounds, and prayed for the grant of similar relief. A Division Bench consisting of J. S. Verma and A. P. Sen, J., following the decision in K. L. Jain's case allowed the writ petitions filed by the aforesaid respondents and directed that they be assigned the years 1966, 1967 and 1971 as their years of allotment respectively under R. 3 (3) (b) of the Seniority Rules, as claimed by them, and their placement in the seniority list be accordingly revised. It expressed the hope that State Government and the Central Government would give them all the consequential relief to which they may be entitled on re-fixation of their seniority. Against the two judgements, the Union of India has preferred these appeals by special leave.

7. In support of the appeal, learned counsel for the appellant advanced two contentions, namely : (1) The respondents were not entitled to have their entire period of continuous officiation in a senior post under R. 9 of the Cadre Rules taken into account in assigning the years of allotment under R. 3 (3) (b) of the Seniority Rules as their



temporary appointment to such senior post in the cadre was subject to the prior approval of the Central Government under sub-r. (2) of R. 9 of the Cadre Rules, and (2) They as non-cadre officers were not entitled to appointment to the cadre post of a Collector because there was no actual vacancy in the cadre strength of promotees. It is urged that the power of the Central Government under Sub-r. (3) of R. 9 of the Cadre Rules to direct termination of appointment of a person other than a cadre officer appointed for a period exceeding three months is a larger power and necessarily carries within its ambit, the lesser power to direct curtailment of the period of officiation. It is further urged that the respondents were not entitled to the benefit of continuous officiation in a senior post to be taken into account in reckoning their year of allotment because there was no vacancy in the cadre strength of promotees. In fact, there was overutilization of State Deputation Reserve Quota. We are afraid, we cannot accept this line of reasoning.

8. The assignment of the year of allotment is governed by R. 3 of the Indian Administrative Service (Regulation of Seniority, Rules, 1954. The relevant clause applicable to the respondents is that contained in R. 3 (3)(b) which reads as follows :

“3(3). The year of allotment of an officer appointed to the Service after the commencement of these rules shall be—

(a) ... ..

(b) Where the officer is appointed to the Service by promotion in accordance with sub-rule (1) of rule 8 of the Recruitment Rules, the year of allotment of the junior most among the officers recruited to the Service in accordance with rule 7 of these rules who officiated continuously in a senior post from a date earlier than the date of commencement of such officiation by the former :

Provided that the year of allotment of an officer appointed to the Service in accordance with sub-rule (1) of rule 8 of the Recruitment Rules who started officiating continuously in a senior post from a date earlier than the date on which any of the officer recruited to the Service in accordance with rule 7 of these Rules so started officiating, shall be determined ad hoc by the Central Government in consultation with the State Government concerned :

Explanation 1 In respect of an officer appointed to the Service by promotion in accordance with sub-rule (1) of rule 8 of the Recruitment Rules, the period of his continuous officiation in a senior post shall, for the purposes of determination of his seniority, count only from the date the inclusion of his name in the Select List or from the date of his officiating appointment to such senior post, whichever is later :

Explanation 2—An officer shall be deemed to have officiated continuously in a senior post from a certain date if during the period from that date to the date of his confirmation



in the senior grade he continues to hold without any break or reversion a senior post otherwise that as a purely temporary or local arrangement."

9. It is common ground that the post of Collector is a senior post. It is not disputed that the respondents were continuously officiating in the senior post for long periods prior to the date of their appointment to the Indian Administrative Service. It is also not in dispute that if the entire period of continuous officiation by the respondents in the senior posts of Collectors were taken into account, they would be entitled to the year 1966 instead of 1967, the year 1967 instead of 1968 and the year 1971 instead of 1972 as the year of allotment to them in accordance with R. 3 (3) (b) of the Seniority Rules.

10. The appointment of the respondents to the senior post of Collector was made in accordance with R. 9 of the Indian Administrative Service (Cadre) Rules, 1954. It is in these terms :

"9. Temporary appointment of non-cadre officers to cadre posts—

(1) A cadre post in a State may be filled by a person who is not a cadre officer if the State Government is satisfied—

(a) that the vacancy is not likely to last for more than three months, or

(b) that there is no suitable cadre officer available for filling the vacancy.

(2) Where in any State a person other than a cadre officer is appointed to a cadre post for a period exceeding

three months, the State Government shall forthwith report the fact to the Central Government together with the reasons for making the appointment.

(2) On receipt of a report under sub-rule (2) or otherwise, the Central Government shall terminate the appointment of such person and appoint thereto a cadre officer, and where any direction is so issued, the State Government shall accordingly give effect thereto.

(4) Where a cadre post is likely to be filled by a person who is not a cadre officer for a period exceeding six months, the Central Government shall report the full facts to the Union Public Service Commission with the reasons for holding that no suitable officer is available for filling the post and may in the light of the advice given by the Union Public Service Commission give suitable direction to the State Government concerned."

11. It is plain upon a construction of R. 9 that under sub-r.

(1) the State Government can direct that a cadre post may be filled by a person who is not a cadre officer if it is satisfied that the vacancy is not likely to last for more than three months or that there is no suitable cadre officer available for filling the vacancy. In these cases, admittedly, the appointments of each of the respondents who was a person other than a cadre officer to the senior post of Collector in the cadre lasted for nearly a year or more and therefore exceeded the period of three months contemplated by Sub-r. (1). Such an appointment could be made



by the State Government on being satisfied that there was no suitable officer for filling the vacancy. It is not averred in the returns filed by the State Government or to Central Government in the High Court that this condition was not satisfied when the respondents were so appointed. Under sub-r. (2), where in any State a person other than a cadre officer is appointed to a cadre post for a period exceeding three months, the State Government is required to forthwith report the fact to the Central Government together with the reasons for making the appointment. From the documents filed by the State Government in the High Court, it appears that such a report was made by the State Government to the Central Government on June 26, 1976. The Central Government by letter dated February, 19, 1977 asked for a consolidated proposal for approval of officiation of non-cadre officers on cadre posts for the half year ending September 30, 1976. In compliance therewith, the State Government sent the required proposal on March 29, 1977. Under sub-r. (3), on receipt of a report under sub-r. (2) or otherwise, the Central Government may direct that the State Government shall terminate the appointment of such person and appoint thereto a cadre officers, and where any direction is so issued, the State Government shall accordingly give effect thereto. Under sub-r. (4), where a cadre post is likely to be filled by a person who is not a cadre officer for a period exceeding six months, the

Central Government is required to report the full facts to the Union Public Service Commission with the reasons for holding that no suitable officer is available for filling the post and may in the light of the advice given by the Union Public Service Commission, give suitable direction to the State Government concerned in that behalf.

12. Interpreting the provisions of sub-rules (2), (3) and (4), the High Court in K. L. Jain's case (1984 Lab IC 374) rightly observed:

"In the instant case, the Central Government never directed the State Government to terminate the petitioner's appointment. It is also not the case that the U. P. S. C. tendered any advice to the Central Government that the appointment be terminated. It is true that there is no specific approval of the Central Government to the appointment of the petitioner but that is not a condition precedent for a valid appointment under Rule 9 and the petitioner officiation in a senior cadre post from 10th November 1975 to 30th September 1976 cannot be ignored on the ground that the appointment was not specifically approved by the Central Government. The petitioner's said officiation cannot also be ignored on the ground that there was no vacancy during this period in the promotion quota of the cadre officers."

The High Court held that prior approval of the Central Government was not a condition precedent to the appointment of non-cadre officer to a cadre post under R. 9 of the Cadre Rules.



further held that the existence of a vacancy in the promotion quota was not a prerequisite for making such an appointment. The appointment of the respondent K. L. Jain to the Indian Administrative Service made by the Central Government on December 7, 1976 was on a post when there was admittedly a vacancy in the promotion quota of non-cadre officers, but his temporary appointment by the State Government to the post of Collector which is a senior post in the cadre under R. 9 on November 7, 1975 was at a time when there was no such vacancy in the promotion quota. It appears that the promotion quota of non-cadre officers to cadre posts was 50 prior to October 1976 and was on that date increased to 56. Since the existence of a vacancy was not a condition precedent for making an appointment under R. 9 of a non-cadre officer to a cadre post; the High Court held that the respondent's officiation from November 10, 1975 to September 30, 1976, could not be held to be invalid or ignored. On the same reasoning, it held that the fact that the State Government had overutilized the Deputation Reserve Quota during the foresaid period, could have no bearing on the question of validity of his appointment on the cadre post. It then added :

"It may be that if the Central Government thought that the State Deputation Reserve Quota which gave rise to a vacancy of a cadre post, it could have directed the State Government to terminate the petitioner's appoint but

such a course was never adopted. As the Central Government did not issue any direction to the State Government to terminate the petitioner's appointment, the appointment has to be held to be valid and given effect to."

13. In that view, the High Court held that the respondent's continuous officiation in a senior post from November 10, 1975 was in accordance with R. 9 of the cadre Rules and the same must ensure for his benefit for reckoning his seniority under R. 3 (3) (b) of the Seniority Rules. Further, it held that the requirement of approval of the Central Government as contained in the proviso to Cl. 1 of S. III of Schedule II of the Indian Administrative Service (Pay) Rules, 1954 cannot be imported into R. 9 of the Cadre Rules or R. 3 (3) (b) of the Seniority Rules. The view expressed by the High Court in K. L. Jain's case (1954 Lab IC 374) was followed with approval in the later case of G. N. Tiwari v. Union of India.

14. Where a person other than a cadre officer is appointed to the Service by promotion in accordance with sub-r. (1) of R. 8 of the Recruitment Rules, the year of allotment of the junior-most amongst the officers recruited to the Service in accordance with R. 7 of the Rules who officiated continuously in a senior post from a date earlier than the commencement of such officiation by the former, is the determinative factor in allocation of the 'year of allotment' under R. 3 (3) of the Seniority Rules. Proviso thereto enjoins that the year of allotment of an officer appointed to the



Service in accordance with sub-r. (1) R. 8 of the Recruitment Rules who started officiating continuously in a senior post from a date earlier than the date on which any of the officers recruited to the Service in accordance with R. 7 so started officiating, shall be determined ad hoc by the Central Government in consultation with the State Government concerned Explanation 1 to R. 3 (3) (b) interdicts that in respect of an officer appointed to the Service by promotion in accordance with sub-r. (1) R. 8 of the Recruitment Rules, the period of his continuous officiation in a senior post shall, for purposes of determination of his seniority, count only from the date of inclusion of his name in the Select List, or from the date of his officiating appointment to such senior post, whichever is later. Explanation provides that an officer shall be deemed to have officiated continuously in a senior post from a certain date if during the period from that date to the date of his confirmation in the senior post he continued to hold without any break or reversion the senior post otherwise than as a purely temporary or local arrangements. In these cases, the respondents who were appointed to the service by promotion in accordance with sub-r. (1) of R. 8 of the Recruitment Rules were entitled under Explanation 1 to have the entire period of continuous officiation in a senior post, for the purpose of determination of their seniority, counted from the date of inclusion of their names in the Select List or from the date of their

officiating appointment to such senior post, whichever was later. They were also entitled by reason of the legal fiction contained in Explanation 2 to have the entire period of their continuous officiation without a break in a senior post from the date of their officiating appointment to such senior post till the date of their appointment into the service, counted for purposes of determining their year of allotment under R. 3 (3) (b) of the Seniority Rules. It cannot be said that their officiation in senior post on the cadre for the period in question was merely fortuitous or stopgap.

15. We are not impressed with the submission that the power of the Central Government under sub-r. (2) of R. 9 of the Cadre Rules to direct termination of appointment of a person other than a cadre officer to a cadre post for a period exceeding three months or more was a larger power and carried with it the power to direct curtailment of the period of officiation of such person. Obviously, the power to direct termination of the appointment of a non-cadre officer in a senior post is distinct from the power to direct curtailment of his period of officiation. There is no such provision made in the Cadre Rules empowering the Central Government to direct the curtailment of the period of officiation of a non-cadre officer on a cadre post for purposes of reckoning his year of allotment under R. 3 (3)-(b) of the Seniority Rules. Such a power cannot be spelled out from sub-r. (2) of R. 9 of the Cadre Rules which confers power



**A. P. Sen**  
**Judge**  
**Supreme Court of India**

the Central Government to direct termination of appointment of a non-cadre officer to a cadre post. In absence of such a provision, the impugned order passed by the Central Government appointing October, 1, 1976 as the date from which the period of officiation is to be reckoned for determining the year of allotment under sub-r. (3) (b) of the Seniority Rules is wholly arbitrary and capricious and therefore rightly struck down by the High Court. The failure of the Central Government to give a direction under sub-r. (3) of R. 9 to terminate appointment of the respondents implies that their continuous officiation in a cadre post had the tacit approval of the Central Government, particularly in view of the fact that the Central Government by letter dated February 1, 1977 required the State Government to submit a consolidated proposal for approval of officiation of non-cadre officers on cadre posts for the half year ending September 30, 1976. This was followed by a report of the State Government dated March 29, 1977. The Central Government by order

dated October 1, 1976 accorded its approval to their appointment in the Indian Administrative Service. Furthermore, the respondents as non-cadre officers could not be denied the benefit of continuous officiation in a senior post merely because the State Deputation Reserve Quota was over utilised: *Harjeet Singh v. Union of India* (1980) 3 SCR 459; (AIR 1980 SC 1275) and *Amrik Singh v. Union of India*, (1980) 3 SCR 485 (AIR 1980 SC 1447).

16. The result, therefore, is that the appeals must fail and are dismissed. There shall be no order as to costs.

17. We are constrained to observe that although the judgement of the High Court in *K. L. Jain's case* (1984 Lab IC 374) was rendered as far back as September 9, 1983 and that in the case of *G. N. Tiwari* on December 16, 1983, the direction issued by the High Court have not been implemented so far. We hope and trust that the Central Government will take steps to comply with the direction issued by the High Court forthwith.

Appeals dismissed.



IT IS THE ESSENCE OF DEMOCRACY  
TO OBEY  
NO MASTER BUT THE LAW



## OBSERVATION

New company was created wholly owned by the principle company with no assets of its own except those transferred to it by the principal company, with no business or income of its own except receiving dividends from shares transferred to it by the principal company - Held that the new company was formed as device to reduce the amount to be paid by way of bonus to workmen—The amount of dividend received by the new Company should therefore be taken into account in assessing the gross profit of the principal company—Payment of Bonus Act (21 of 1965), Sec 4.

## OBSERVED BY

Mr. O. Chinnappa Reddy and  
 Mr. V. Khalid  
 Honble Judges, Supreme Court of India

## IN

Civil Appeal No. 1429 (NL) of 1975 decided on 19-8-1985 in the case of the Workmen Employed in Associated Rubber Industry Ltd., Bhavnagar, Appellant v. The Associated Rubber Industry Ltd., Bhavnagar and another, Respondents.

## TEXT

Chinnappa Reddy, J.:— The workmen of The Associated Rubber Industry Ltd, Bhavnagar are the appellants in this appeal filed pursuant to a certificate under Art. 133 (1) of the Constitution granted by the High Court of Gujarat.

2. The Associated Rubber Industry Ltd. had purchased, some year back, shares of INARCO Ltd. by investing a sum of Rs. 4,50,000/- They were getting annual dividends in respect of these shares and the amount so received was shown in the profit and Loss Account of the company year after year. It was taken into account for the purpose of calculating the bonus payable to the workmen of the company. Sometime in

the course of the year 1968, the company transferred the shares of INARCO Ltd. held by it to Aril Bhavnagar Ltd. (subsequently changed to the Aril Holdings Ltd.), a subsidiary company wholly owned by The Associated Rubber Industry Ltd. Aril Holdings Ltd. had no other capital except the shares of INARCO Ltd. transferred to it by the Associated Rubber Industry Ltd. It had no other business or source of income whatsoever except receiving the dividend on the shares of INARCO Ltd. The dividend income from the shares of INARCO Ltd. was not transferred to the Associated Rubber Industry Ltd. and therefore, it did not find place in the Profit and Loss Account of the company



with the result that the available surplus for the purposes of payment of bonus to the workmen of the company became reduced. The net result of the exercise was that bonus at the rate of 4% only was paid to the workers for the year 1969 instead of at the rate of 16% to which they would have otherwise been entitled. We may mention here that Aril Holdings Ltd. was itself wound up in the year 1971 and amalgamated with The Associated Rubber Industry Ltd.

3. The workmen of the Associated Rubber Industry Ltd. Bhavnagar raised an industrial dispute claiming that they were entitled to be paid bonus at the rate of 16% for the year 1969. According to them, the transfer of the shares of INARCO Ltd. to Aril Holding Ltd. was no more than a device to avoid payment of higher bonus to the workmen. The Industrial Tribunal and thereafter the High Court of Gujarat under Art. 226 of the Constitution held that The Associated Rubber Industry Ltd. and Aril Holdings Ltd. were two independent companies with separate legal existence and therefore, the profits made by Aril Holdings Ltd. could not be treated as profits of The Associated Rubber Industry Ltd. for the purpose of computing the gross profits earned by the Associated Rubber Industry Ltd. It was further held that there was no evidence to show that the transfer of shares to Aril Holdings Ltd. was only a device to avoid payment of bonus to the workmen.

4. It is true that in law The Associated Rubber Industry Ltd. and

Aril Holdings Ltd. were distinct legal entities having separate existence. In our view, that was not an end to the matter. It is the duty of the court in every case where ingenuity is expended to avoid taxing and welfare legislation, to get behind the amorphous screen and discover the true state of affairs. The court is not to be satisfied with form and leave well alone the substance of a transaction. In *Commissioner of Income-tax, Madras v. Sri Meenakshi Mills Ltd.* (1967) 1 SCR, 934 at 941 : the judicial approach to such problems was stated as follows :

“It is true that from the juristic point of view the company is a legal personality entirely distinct from its members and the company is capable of enjoying rights and being subject to duties which are not the same as those enjoyed or borne by its members. But in certain exceptional cases the Court is entitled to lift the veil of corporate entity and to pay regard to the economic realities behind the legal facade. For example, the Court has power to disregard the corporate entity if it is used for tax evasion or to circumvent tax obligation. For instance, in *Apthorp v. Peter Schoenhofen Breweries Co.* (1899) 4 Tax Cas 41 the Income Tax Commissioners had found as a fact that all the property of the New York company, except its land, had been transferred to an English company, and that the New York company had only been kept in being to hold the land since aliens were not allowed to do



under New York law. All but three of the New York company's shares were held by the English company, and as the Commissioner also found, if the business was technically that of the New York company, the latter was merely the agent of the English company. In the light of these findings the Court of Appeal, despite the argument based on *Loman's case* (1896) AC 22, held the New York business was that of the English company which was liable for English income-tax accordingly. In another case *Restone Tyre and Rubber Co. v. Llewellyn* (1957) 1 WLR 464 an American company had an arrangement with its distributors on the Continent of Europe whereby they obtained supplies from the English Manufacturers, its wholly owned subsidiary. The English company credited the American with the price received after deducting the costs plus 5 per cent. It was conceded that the subsidiary was a separate legal entity and not a mere emanation of the American parent, and that it was selling its own goods as principal and not its parent's goods as agent. Nevertheless, these sales were a means whereby the American company carried on its European business and it was held that the substance of the arrangement was that the American company traded in England through the agency of its subsidiary. We therefore reject the argument of Mr. Venkataraman on this aspect of the case." More recently we have pointed out in *Mc. Dowell and Company Limited v. Commercial Tax Officer* (1985) 3 SCC 230.

"It is up to the Court to take stock to determine the nature of the new and sophisticated legal devices to avoid tax and consider whether the situation created by the devices could be related to the existing legislation with the aid of emerging techniques of interpretation as was done in *Ramsay* (1981 1 All ER 865.) *Burman Oil* (1982 STC 30) and *Dawson* (1984-1 All ER 530), to expose the devices for what they really are and to refuse to give judicial benediction".

"The fact that the court accepted that each step in a transaction was a genuine step producing its intended legal result did not confine the court to considering each step in isolation for the purpose of assessing the fiscal results."

Avoidance of welfare legislation is as common as avoidance of taxation and the approach in considering problems arising out of such avoidance has necessarily to be the same.

5. If we now look at the facts of the case, what do we find? A new company is created wholly owned by the principal company with no assets of its own except those transferred to it by the principal Company, with no business or income of its own except receiving dividends from shares transferred to it by the principal company and serving no purpose whatsoever except to reduce the gross profits of the principal company. These facts speak for themselves. There cannot be direct evidence that the second company was a device to reduce the gross profits of the principal company for



whatever purpose. An obvious purpose that is served and which stares one in the fact is to reduce the amount to be paid by way of bonus to workmen. It is such an obvious device that no further evidence, direct or circumstantial, is necessary. It was argued that in 1971, the Aril Holdings Ltd. was wound up and amalgamated with The Associated Rubber Industry Ltd. and that this circumstance showed that the initial creation of Aril Holdings Ltd. was not a device of avoidance. But the learned counsel for the company was unable to explain why in the first instance Aril Holdings Ltd. was created and why later it was wound up. probably, after Aril Holdings Ltd. was created, some unforeseen difficulties arose which

have not been brought to light before us and it became necessary to wind up and amalgam it with. The Associated Rubber Industry Ltd. We are therefore satisfied that the amount of dividend from INARCO Ltd. received by Aril Holdings Ltd. should be taken into account in assessing the gross profit of the Associated Rubber Industry Ltd. for the purpose of calculating the rate of bonus payable to the workmen of The Associated Rubber industry. The appeal is allowed with costs and it is declared that the workmen of The Associated Rubber Industry Ltd. Bhavnagar are entitled to be paid bonus at the rate of 16 per cent for the year 1969.

Appeal allowed



## OBSERVATION

**Promotion—Persons promoted to posts in violation of rules—Persons have been allowed to function in higher posts for 15 to 20 years with due consideration—It would be unjust to revert—Entire period of officiation to be counted for seniority—Indian Economic Service Rules, 1961, R. 8 (1) (c) (ii) and R. (16). Indian Statistical Service Rules, 1961, R. 8 (i) (c) (ii) and R. 16.**

## OBSERVED BY

Mr O. Chinnappa Reddy and Mr. E. S. Venkataramiah  
Hon'ble Judges, Supreme Court of India

## IN

Civil Misc. Petition No. 2604 of 1985 in Writ Petition No. 1595 of 1979, decided 1-2-1986 in the case of Narender Chandha and others, Petitioners v. Union of India and others, Respondents.

## TEXT

Venkataramiah, J. :— The perennial dispute regarding seniority between direct recruits and promotees which exists in almost all the departments of Government has not spared the Indian Economic Service and the Indian Statistical Service with which we are concerned in this case. This is the second phase of the battle which is being waged before this Court. Earlier certain persons who had been holding posts in Grade IV of these two Services had filed writ petition No. 1595 of 1979 under Art. 32 of the Constitution of India praying for a writ, direction or order in the nature of mandamus directing the Union of India to confirm/regularise the petitioners in the posts held by them as and from the dates when they became due for confirmation or regularisation in accordance

with the Indian Economic Service Rules, 1961 or the Indian Statistical Service Rules, 1961 and to consider them for all future promotions when due on the basis of such seniority. The said petition was filed in a representative capacity with the leave of the Court under O. I. R. 8 C. P. C. A few officers who had been recruited as direct recruits to the posts in Grade IV in the said departments were impleaded as respondents and they were sued in a representative capacity as representing all other direct recruits who were likely to be affected by the decision. After the above case was heard, the Court passed a short order on Feb. 1, 1984 which reads thus :

“We are not able to understand why the vacancies available to the departmental candidates under R. 8 (ii) of the Indian Economic and Indian Statis-



tical Services Rules, 1961, have not been filled up on regular basis. We find that some of the departmental candidates (petitioners) have been holding the promotional posts on ad hoc basis for several years. There appears to be no justification for keeping them 'ad hoc' so long. We, therefore, issue a writ of Mandamus directing the Union of India to fill up, within four weeks from today, the vacancies available to the departmental candidates under R. 8 (ii) with effect from the date from which the petitioners became entitled to be promoted on regular basis. Their seniority will be determined according to Rules. We wish to make it clear that there is no question of any rotation system being applied under the Rules, as they exist now. The writ petition is disposed of in these terms. There will be no order as to costs."

(Rule 8 (ii) has to be read as R. 8 (1) (a) (ii))

2. The Union of India, as can be seen from the order set out above, was directed to comply with the directions contained therein within four weeks from the date of the order. On the expiry of four weeks, stipulated by this Court, the Union of India filed an application for extension of time to comply with the directions contained therein fully. Time was extended by the Court till April 30, 1984. On May 1, 1984 the Union of India filed before the Court two sets of seniority lists in respect of the above two Services, namely, lists based on the principle of rotation and lists based on Rule 9-c of the Indian

Economic Service/Indian Statistical Service Rules. Since on a perusal of said lists it was found that the position of some of the departmental promoters who had already put in nearly 15 years of service in Grade IV was worse than the position in which they were before the writ petition was filed and facing imminent threat of reversion to the feeder posts from which they had been promoted several years ago, the Court directed the petition to come for hearing before the Court on reopening after summer vacation and directed that status qua should be maintained in the meanwhile. Then on November 24, 1984 the Court while declining to endorse either of the two seniority lists directed the Union of India to implement the order dated February 1, 1984 on or before 30th November, 1984. In the meanwhile the petitioners filed Miscellaneous petition No. 2604 of 1984 complaining that the Union of India failed to comply with the order made by this Court and that action should be taken for contempt against it. While disposing the application for contempt on behalf of the Union of India it was stated in the course of the affidavit sworn by Shri P. L. Sakarwal, Deputy Secretary, Department of Economic Affairs, Delhi thus:

"23. In view of the submissions made above this Respondent would submit that the directions of the Hon'ble Court dated 1-2-1984 in the matter of filling vacancies under R. 8 (ii) to fix seniority according to Rules without application of rotation System,



been complied with bona fide and in a good faith R. 8 (ii) of the TES Rules/ISS Rules provides for quota for the departmental promotees and also the manner in which the Select List for promotion by a duly constituted DPC presided over by a Member of UPSC has to be drawn. All the vacancies available to the departmental candidates R. 8 (ii) up to the end of 1983 have already been given to them by issuance of Select Lists drawn from time to time. Action is in process to prepare further Select List in respect of the vacancies available to the officers till the end of the year 1984. As regards seniority, the Hon'ble Court had to fix the seniority according to the Rules and without the application of the rotation system. The revised seniority lists prepared by this Respondent and finalised after inviting objections etc. from the concerned officers have been framed according to the Rules i.e. in terms of the provisions of R. 9-C of the IES Rules/ISS Rules and without application of the rotation system. This Respondent would, therefore, urge with respect and all humility that he has complied with the directions of the Hon'ble Court bona fide and in good faith. However, if there is any slip on the part of this Respondent in carrying out the directions of this Hon'ble Court or if the Hon'ble Court considers that the orders should have been executed in any other manner, this Respondent would tender unconditional apology and will be duty bound to obey and implement, such orders/directions as this Hon'ble Court may deem

fit or pleased to issue in the circumstances of the case."

3. In the meanwhile certain direct recruits also intervened in the course of the said petition and requested that they should be heard before any order was passed by the Court on the Contempt application. While the order passed by the Court on February 1, 1984 did not require any clarification at all, since the parties tried to place different interpretations on it, prayer was made by the Union Government as stated above seeking further clarifications in the light of certain recent decisions rendered by this Court, we gave opportunity to all the parties to make their submissions once again. Availing themselves of the opportunity given by the Court learned counsel for the promotees and the direct recruits have virtually reargued the matter. It should be stated here that no specific stand was taken on this occasion by the Union Government except bringing to the notice of the Court the relevant provisions of law. On its behalf it was submitted very fairly by Shri F.S. Fariman, that there was no intention on the part of the Government of any of its officers to flout the order of the Court passed earlier and that if the Court found that there has been any mistake in the preparation of the lists of seniority, those lists would be prepared afresh in the light of any direction that may be given by the Court in the course of these proceedings. Having regard to the facts of the case and the events that have fo-



llowed the order passed by this Court on February 1, 1984, we do not feel called upon to take any action for contempt against the Union Government or any of its officers for not obeying the orders of this Court. we have, however, found it necessary to consider the matter again in the light of the submissions made by the parties and issue fresh directions in this case. We feel that a detailed order is also called for in the circumstances of the case.

4. The Indian Economic Service Rules, 1961 and the Indian Statistical Service Rules, 1961 (hereinafter referred to as 'the Rules') which are more or less identical with regard to the questions involved in this case were notified on November 1, 1961 and these Services were constituted effect from that day by encadring numerous posts carrying economic and statistical functions in the various ministries of the Government of India. These Services were meant to comprise a pool of officers having appropriate qualifications for performing the aforesaid technical functions involved in various posts. The strength of the various grades of the Indian Economic Service at the initial constitution of the Service, i.e., on November 1, 1961 was Grade 1-15, Grade 11-15, Grade 111-95 and Grade IV-199=Total 324 posts. The strength of the various grades of the Indian Statistical Service at the initial constitutions of the Service, i.e. on November 1, 1961 was Grade

1-8, Grade II-7, Grade III-54 and Grade IV-116=Total 185 posts.

5. The officers of Grade I to Grade IV are classified as Class-I Officers. The authorised permanent strength of each of the Services is to be fixed by Controlling Authority with the guidance of the Ministry of Finance in accordance with the provisions of the Rules. It is required to be based on the following principles:

(1) it shall be assumed that 80 per cent of the total number of semipermanent posts are likely to be continued indefinitely in one form or another, and shall be provided for in the permanent strength: and

(2) all the purely temporary posts and 20 per cent of the semi-permanent posts shall be excluded for purposes of determining the permanent strength.

6. The Ministry of Home Affairs (Department of Personnel and Administrative Reforms) advised by a Board known as the Indian Economic Statistical Service Board is designated as the Controlling Authority under R. 6 of the Rules. Initial constitution of both the Services was required to be done in accordance with R. 7. Under that Rule the Union Public Service Commission was required to constitute a Selection Committee with a Chairman or a Member of the Commission as President, not more than two representatives of the participating ministries



and the Chief Economic Adviser in the Ministry of Finance (Department of Economic Affairs) to determine the suitability of departmental candidates for appointment to the different grades and to prepare an order of preference for each grade for the initial constitution of the Service. On receipt of the Committee's report the Commission was required to forward its recommendations to the Government and such recommendations might include a recommendation that a person considered suitable for appointment to a grade might, if a sufficient number of vacancies were not available in that grade, be appointed to a lower grade. The departmental candidates who were not absorbed at the initial constitution of the Service were to continue to work as on the date of the initial constitution and were given the opportunity to apply (and getting selected if they were found suitable) for future vacancies. We are informed that the notifications regarding the initial constitution of these two Services were issued by the middle of February, 1964 with effect from February 15, 1964. Future maintenance of these two Services is governed by Rule 8 of the Rules Initially R. 8, which is relevant for the purposes of this case read as follows :

“8 (1) Future maintenance of the service—After the initial constitution of the Service has been completed by appointment of departmental candidates or otherwise, vacancies shall be filled as hereinafter provided.

(a) Grade IV - Assistant Director-

(i) Not less than 75 per cent of the vacancies in this grade shall be filled by direct recruitment through an open competitive examination to be held by the Commission in the manner prescribed in Sch. II. Provided that 25 per cent of the said quota for direct recruitment may be set apart for a maximum period of 5 years for absorption of officers considered suitable for appointment at the initial constitution of the Service but who could not be so appointed in the absence of vacancies.

(ii) Not more than 25 per cent of the vacancies in this grade shall be filled by selection from among officers serving in officers under the Government in Economics posts recognised for this purpose by the Controlling Authority who shall prepare a list of such posts in consultation with the Commission. The Controlling Authority may, in consultation with the Commission, add to or modify the list from time to time. The selection will be made from amongst those who have completed at least 4 years of service in those posts on the basis of merit with due regard to seniority by the Controlling Authority on the advice of the Commission.....”

(Rule 8'1) (a) now reads thus :—

“8 (1) Future maintenance of the service ; after the initial constitution of the service had completed by appointment of departmental candidates or otherwise and after promotions in accordance with sub-rule (2A) of R. 7 have taken place, vacancies shall be filled as hereinafter provided.



## (a) Grade IV—Assistant Director.

(i) Not less than 75 per cent of the vacancies in this grade shall be filled by direct recruitment through an open competitive examination to be held by the Commission in the manner prescribed in Sch. II. Provided that 25 per cent of the said quota for direct recruitment may be set apart for a maximum period of 5 years for absorption of officers considered suitable for appointment at the initial constitution of the service but who could not be so appointed in the absence of vacancies.

(ii) Not more than 25 per cent of the vacancies in this grade shall be filled by selection from among officers serving in offices under the Government in Economic posts recognised for this purpose by the Controlling Authority who shall prepare a list of such posts in consultation with the Commission. The Controlling Authority may, in consultation with the Commission, add to or modify the list from time to time. The selection will be made from amongst those who have completed at least 4 years of service on a regular basis in those posts on the basis of merit with due regard to seniority by the Controlling Authority on the advice of the Commission :

Provided that if any junior person in an office under the Government is eligible and is considered for selection for appointment against these vacancies, all persons senior to him in that office shall also be so considered notwithstanding that they may not have rendered 4 years of service on a regular basis in their

posts.”

7. After the initial constitution of the two Services was completed it was found that a number of posts carrying Economic/Statistical functions could be considered for inclusion in the Clerks' Grade due either to misunderstanding or to inadvertence. Further the process of formation of the Indian Economic Service and the Indian Statistical Service was prolonged for a number of years and the need for appointing more officers in the said Departments during that long period also gradually several posts carrying economic/statistical functions were created. Although R. 8 provided that not more than 75 per cent of the vacancies in Grade IV should be filled up by direct recruitment through an open competitive examination to be held by the Union public Service Commission in the manner prescribed in Sch. II to the Rules and further provided that more than 25 per cent posts of vacancies in that grade should be filled by selection from among officers serving in the offices under the Government in Economic/Statistical posts recognised for that purpose by the Controlling Authority, no direct recruitment was resorted to till about the year 1968. In the meanwhile a large number of persons in the feeder posts were appointed to the posts in Grade IV from time to time the year 1962 onwards although the orders promoting them stated that they had been promoted temporarily. It is not disputed that those promotees have been ho-



those posts continuously till now without being reverted to the feeder posts from which they had been promoted. Some have retired from those posts on attaining the age of superannuation.

8. We shall reproduce below one of the notifications issued in connection with the promotion to the posts in Grade V of such officers, some of whom are the petitioners in this petition. It reads thus :

**“GOVERNMENT OF INDIA  
 PLANNING COMMISSION**

Yojana Bhawan, Parliament Street  
 New Delhi-1, the 20th/23rd November '65.

**NOTIFICATION**

No. F. 8 (10)/65-ADM. I : The President is pleased to appoint the following Economic Investigators Grade I, Planning Commission, as Research Officers in the Commission in a temporary capacity with effect from the 6th November 1965 (forenoon), and until further orders :—

Shri K. V. Vishwanathan  
 Shri S. N. Padru  
 Shri C. L. Kapur  
 Smt. K. Passi  
 Shri Narendra Chaddha  
 Shri R. N. Monkhey  
 Shri N. Srinivasan  
 Shri K. Suryanarayana  
 Shri P. N. Radhakrishnan  
 Shri B. R. Kharbanda  
 Shri Kamla Prasad  
 Shri M. M. Gupta  
 Shri S. P. Kumar

Sd/—

(N. S. Gidwani)  
 Deputy Secretary  
 to the Govern-  
 ment of India.

All these officers excepting Shri P.N. Radhakrishnan are either permanent or quasi-permanent in the grade of Economic Investigators, Shri Radha kishnan is quasi-permanent in the grade of Senior Computer. The promotion of all is in the direct line.

9. In another order of promotion issued while promoting another officer by name Jagdish Chandra on November 21, 1966 it was mentioned that his promotion to the post of Research Officer was in direct line of Economic Investigator Grade I/II. It should be stated here that although R. 8 (1) (a) provided that not less than 75 per cent of the vacancies in Grade IV of the two Services should be filled up by direct recruitment through an open competitive examination to be held by the Commission in the manner prescribed in Sch. II to the Rules and that not more than 25 per cent of the vacancies in the Grade could be filled up by a selection from among officers serving in officer under the Government in Economic/Statistical posts recognised for this purpose by the Controlling Authority, the prescribed quota of appointment from the two different sources, referred to above, was not maintained right from the Commencement of the Constitution of the Services. The initial cons-



stitution of the two Services was completed under R. 7 of the Rules with effect from February 15, 1964 as mentioned earlier. Therefore R. 7-A was added. That rule was added by a notification dated December 24, 1966 and it has been amended subsequently by a notification dated February 12, 1972. Rule 7A made special provision regarding certain departmental candidates who were to be absorbed in the two Services. It provided that notwithstanding anything contained in R. 8 of the Rules the Controlling Authority on the advice of the Board should constitute a Selection Committee for the purpose of appointing officers who were departmental candidates to the Services in question. A departmental candidate who was not selected for appointment for any grade in the Services could continue to hold the post which he was holding then and might be considered by the Controlling Authority on the advice of the Board for appointment to the service at the subsequent stage or stages in consultation with the Commission. It further provided that any departmental candidate, referred to in sub-rule (1) of R. 7-A who did not obtain a selection to any Grade in the Service desire to be absorbed in the service might continue to hold the post held by him immediately before the selection as if he had not been selected. The validity of R. 7-A was questioned by some of the direct recruits who were appointed in the year 1968 in the High Court of Delhi by a Writ Petition. We understand that the said writ petition has been transfe-

rrred to the file of the Central Administrative Tribunal and the said writ petition is still pending. We are not concerned here with the merits of contentions urged by the contesting parties in those proceedings. We are concerned in this case only with the question of seniority as between direct recruits and promotees.

10. From the statements annexed to the counter-affidavit filed by Shri Subramanian, Director in the Department of Economic Affairs, it is seen that in the Indian Economic Service there were 3 vacancies for direct recruits in the year 1964, 18 in the year 1965, 80 in the year 1966 and 12 in the year 1967. Nobody was recruited directly to those posts during those years. In the year 1968 there were 11 vacancies for direct recruits but 32 were recruited directly during that year. In 1969 there were 6 vacancies for direct recruits, 31 were recruited, in 1970 there were 33 vacancies for direct recruits, in 1971 there were 12 vacancies for direct recruits, in 1973 there were 25 vacancies for direct recruits, in 1974 there were 20 vacancies for direct recruits and in 1975 there were 11 vacancies for direct recruits. By the year 1984 in all there were 435 vacancies for direct recruits out of which only 342 posts were filled up by direct recruitment. In all 93 posts intended for direct recruits remained unfilled and most of them were held along by persons who had been promoted from the feeder posts. The position in the Indian Statistical Service was more or less the same. As against a total of 303 vacancies meant for direct recr-







tal candidate. It is not known whether any of them were found to be unfit on the basis of their record of service only. It is, however, seen that the select list contained only 33 names because the Departmental Promotion Committee felt that they were the only vacancies for which it could make recommendations under R. 8 (1) (a) (ii) of the Rules. If it had made recommendations to the Government in respect of all the vacancies which were available then, perhaps, the names of some others who were left out would have been included in the select list. Then after an interval of 12 years the Departmental Promotion Committee met in the year 1982. There again the same procedure was followed and the next meeting of the Departmental promotion Committee, as already stated, was in 1984. For no fault of the petitioners and the officers similarly situated their cases for promotion were not considered every year and even those who have been found fit by the Departmental Promotion Committee for promotion had to wait for nearly 15 years to get into the 'regular' service through a select list prepared by the Departmental Promotion Committee.

11. In compliance with our direction the Government has produced before the Court two lists showing the name of officer who were appointed to Grade IV posts of Indian Economic/Statistical Service either regularly or on ad hoc basis arranged according to the dates from which they have been officiating in these posts continu-

ously.

12. A large number of decisions were cited at the Bar by the learned counsel for the parties. Some of them are *S. B. Patwardhan v. State of Maharashtra*, (1977) 3 SCR 775, *Rajendra Narain Singh v. State of Bihar*, (1977) 3 SCR 450, *Baleshwar Dass v. State of U. P.*, (1981) 1 SCR 449, *A. J. Dhana v. Union of India*, (1983) 2 SCR 936, *P. S. Mahal v. Union of India*, (1983) 3 SCR 847, *O. P. S. v. Union of India*, (1985) 1 SCR 1000, *Karam Pal v. Union of India*, (1985) 3 SCR 271, *G. S. Lamba v. Union of India*, (1985) 3 SCR 431, *Pranab Kumar Goswami v. State of West Bengal*, (1985) Supp SCC 221 and *D.K. Mishra v. Union of India*, (1985) Supp SCC 243. We have carefully considered all the decisions cited before us.

13. It is now well-settled that it is permissible for the Government to recruit persons from different sources to constitute a service. It is also open to it to prescribe a quota for each source. Rules of recruitment framed on the above lines are perfectly legitimate and quite consistent with Articles 14 and 16 of the Constitution. It is also true that when the Rules of recruitment prescribe recruitment to different Services in accordance with the specified quota the Government is bound to appoint persons to the service concerned in accordance with the said Rules. The seniority of persons recruited from different sources have to be regulated accordingly. In the far there can be no controversy.



are faced in this case with the problem of resolving conflicts which have arisen on account of a violent departure made by the Government from the Rules of recruitment by allowing those who were appointed contrary to the Rules to hold the posts continuously over a long period of time. The question is whether after such a long period it is open to the Government to place them in seniority at a place lower than the place held by persons who were directly recruited after they had been promoted, and whether it would not violate Arts. 14 and 16 of the Constitution if the Government is allowed to do so. Promotions of officers have been made in this case deliberately and in vacancies which have lasted for a long time. A letter dated August 11, 1978 written by Shri S. D. Patil, Minister of State for Home Affairs, Personnel Department to Shri Ganga Bhakt Singh, Member of Parliament substantiates the conclusion. The relevant part of the letter reads :

“Government resorted to making ad hoc appointments as it was separately considering proposals to reorganise Grade IV of the two Services. Pending such reorganisation Govt. has taken a deliberate decision to restrict direct recruitment for the present. It is, therefore, not correct to say that ad hoc appointments have been made due to non-availability of direct recruits. I may add that but for this deliberate decision, most of the officers holding ad hoc posts in Grade IV would have continued to

stagnate in the lower posts of Investigators.”

14. At one stage it was argued before us on behalf of some of the respondents that the petitioners who have not been appointed in accordance with R. 8 (1) (a) (ii) could not be treated as members of the Indian Economic Service or of the Indian Statistical Service at all and hence there was no question of determining the question of seniority as between the petitioners and the direct recruits. This argument has got to be rejected. It is true that the petitioners were not promoted by following the actual procedure prescribed under R. 8 (1) (a) (ii) but the fact remains that they have been working in posts included in Grade IV from the date on which they were appointed to these posts. The appointments are made in the name of the President by the competent authority. They have been continuously holding these posts. They are being paid all along the salary and allowances payable to incumbents of such posts. They have not been asked to go back to the posts from which they were promoted at any time since the dates of their appointment. The orders of promotion issued in some cases show that they are promoted in the direct line of their promotion. It is expressly admitted that the petitioners have been allowed to hold posts included in Grade IV of the aforesaid services, though on an ad hoc basis. (See Para 21 of the counter-affidavit filed by Shri P. G. Lele, Deputy Secretary, Department of Per-



sonnel and Administrative Reforms). It is, therefore, idle to contend that the petitioners are not holding the posts in Grade IV of the two Services in question. It is significant that neither the Government has issued orders of reversion to their former posts nor has anybody so far questioned the right of the petitioners to continue in the posts which they now holding. It would be unjust to hold at this distance of time that on the facts and in the circumstances of this case the petitioners are not holding the posts in Grade IV. The above contention is therefore without substance. But we, however, make it clear that it is not our view that whenever a person is appointed in a post without following the Rules prescribed for appointment to that post, he should be treated as a person regularly appointed to that post. Such a person may be reverted from that post. But in a case of the kind before us where persons have been allowed to function in higher posts for 15 to 20 years with due deliberation it would be certainly unjust to hold that they have no sort of claim to such posts and could be reverted uncere- moniously or treated as persons not belonging to the Service at all, particularly where the Government is endowed with the power to relax the Rules to avoid unjust results. In the instant case the Government has also not expressed its unwillingness to continue them in the said posts. The other contesting respondents have also not urged that the petitioners should be sent out of the said posts. The only question agita-

ted before us relates to the seniority as between the petitioners and the direct recruits and such a question can arise only where there is no dispute regarding the entry of the officers concerned into the same Grade. In the instant case there is no impediment even under the Rules to treat these petitioners as others who are similarly situated as persons duly appointed to the posts in Grade IV because of the enabling provision contained in R. 16 thereof. Rule 16 as it stood at the relevant time is as follows :

“16. The Government may relax the provisions of these rules to such extent as may be necessary to ensure satisfactory working or remove inequitable results.”

Now Rule 16 reads thus :

“16. Powers to relax : The Government may in consultation with the Commission and for reasons to be recorded in writing relax any of the provisions of these rules with respect to any class or category of persons or posts and no such relaxation shall be given so as to have retrospective effect.”

15. G. S. Lamba's case (1985) 1 SCR 431 : (AIR 1985 SC 1019) (supra) may be carefully considered at this stage. In that case this Court was concerned with the Indian Foreign Service which was governed by the Indian Foreign Service, Branch 'B' (Recruitment, Career Seniority and Promotion) Rules, 1964. The said rules provided for recruitment to the said Service from three different sources (i) direct recr-



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nt by competitive examination, (ii) substantive appointment of persons included in the select list promoted on the basis of a limited competitive examination and (iii) promotion on the basis of seniority. One of the rules provided that the recruitment could be made from the above sources on the following basis : (i) 6/6th of the substantive vacancies to be filled in by direct recruitment, (ii) 33 % of the remaining 5/6 of the vacancies to be filled on the basis of results of limited competitive examinations and (iii) the remaining vacancies to be filled by promotion on the basis of seniority. The Court found that the direct recruitment had not been made for years, limited competitive examination had also not been held for years and promotions from the select list had been made in excess of the quota. It found that there was enormous departure from the rules of recruitment in making appointments over several years. The Court was of the view that the situation in this case was similar to the situation in two other earlier cases of this Court in *A. Janardhana's case*, (AIR 1983 SC 769) (supra) and *P. Singla*, (AIR 1984 SC 1595) (supra). The Court felt that in the circumstances it should be presumed that the excess appointment by promotion had been made in relaxation of the Rules since there was power to relax the Rules similar to the power under R. 16 in the Rules in which we are concerned here. Justifying the above view the Court observed on page 458-459 (of SCR).

"It was however contended that it is not permissible to infer that promotions in excess of quota were given by relaxing the quota rule because the posts in Integrated Grades II and III were within the purview of the Union Public Service Commission and the proviso to Rule 29 (a) mandates that power to relax is hedged in with a condition that it can be done after consultation with the Commission, and there is nothing to show that the Commission was ever consulted. Undoubtedly, the proviso to Rs. 29 (a) requires that the controlling authority cannot relax any of the provisions of the rules in respect of posts which are within the purview of the Union Public Service Commission unless after consultation with the Commission. It was submitted that nothing is placed on the record by the petitioners to show that power to relax the quota rule was exercised after consultation with the Union Public Service Commission. Assuming that there was no consultation, would the exercise of power to relax be vitiated and the appointments made in relaxation of the mandatory quota rule be ab initio invalid? Commencing from the decision of the Privy Council in *Montreal Street Railway Co. v. Normandin*, AIR 1917 P. C. 142 it is well-settled that 'when the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work general



inconvenience or injustice to persons who have not control over those entrusted with the duty and that at the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable, not affecting the validity of the acts done'. The view was expressed in the context of the failure to revise list of Jurors by the Sheriff according to the revised statutes of Quebec and conviction was challenged on the ground of mistrial held by selecting Jurors from unrevised lists. The challenge failed. Coming home in *State of U. P. v. Manbodhan Lal Srivastava*, 1958 SCR 533 a Constitution Bench of this Court specifically held that where consultation with the Public Service Commission is provided as required by Art. 320 (3) (c) of the Constitution such provision is not mandatory and they do not confer any rights on public servants so that the absence of consultation or irregularity in consultation does not afford him a cause of action in a Court of law. There are number of subsequent decisions to which our attention was called reiterating the same principle. Therefore assuming there was failure to consult the Union Public Service Commission before exercising the power to relax the mandatory quota rule and further assuming that the posts in Integrated Grade II and II were within the purview of the Union Public Service Commission and accepting for the time

being that the Commission was consulted before the power to relax rule was exercised yet the action taken would not be vitiated nor would it furnish any help to Union of India which cannot take any advantage of its failure to consult the Commission. Therefore it can be safely stated that the enormous departure from the quota rule year to year permits an inference that the department was in exercise of the power of relaxation of the quota rule conferred on the controlling authority. Once there is power to relax the mandatory quota rule, appointments made in excess of the quota from any given source would not be illegal or invalid but would be valid and legal as held by this Court in *N. K. Chohan v. State of Gujarat*. (1977) 1 SCR 1037. Therefore the promotion of promotees was regular and legal both on account of the fact it was made to meet the exigencies of service in relaxation of the mandatory quota rule and to satisfy substantive vacancies in service."

16. The Court ultimately quashed the seniority list and directed the preparation of seniority list on the basis of length of continuous officiation in the cadre. The facts in this case being almost identical there is no reason to depart from the view expressed in *G.S. Lamsani*. This case should not be adopted here also.

17. The continuance to these positions may be justified on the basis of the above quoted R. 16 on the assumption that the Government had relaxed the Rules and appointed them to



ists in question to meet the administrative requirements.

18. The enormity of the prejudice that is likely to be caused to the petitioners and others who are similarly situated can be demonstrated by setting out the effect of sticking to quota rule as found in R. 8 (1) (2) even though there has been a deliberate deviation from it. The result of applying the quota rule would be as follows : petitioner No. 1 who was promoted to Grade IV on November 6, 1965 would be senior to a direct recruit of 1974 batch. Petitioner No. 3 who was promoted to Grade IV on March 22, 1966 would become junior to a direct recruit of 1966 batch. Petitioner No. 7 who was promoted to Grade IV post in July 1, 1966 would become junior to direct recruit of 1982 batch. Petitioner No. 10 who was promoted to Grade IV on May 18, 1968 would become junior to direct recruits of 1982 batch. Petitioners Nos. 16 to 18 and 21 to 25 would continue to be treated as ad hoc appointees and will be junior to everybody appointed till now into the Service as they cannot be fitted anywhere even though they have put in 9 to 15 years of service in Grade IV. These startling results ought to shock anybody's conscience. The only just solution to this problem is to treat the petitioners as persons duly appointed to the Service with effect from the day on which they were promoted to the Grade IV posts.

19. As observed in *D. R. Nim v. Union of India*, (1967) 2 SCR 355:

when an officer has worked for a long period as in this case for nearly fifteen to twenty years in a post and had never been reverted it cannot be held that the officer's continuous officiation was a mere temporary or local or stop gap arrangement even though the order of appointment may state so. In such circumstances the entire period of officiation has to be counted for seniority. Any other view would be arbitrary and violative of Arts. 14 and 16 (1) of the Constitution because the temporary service in the post in question is not for a short period intended to meet some emergent or unforeseen circumstances Cl. (b) of R 9C of the Rules which deals with the question of seniority of promotees becomes irrelevant in the circumstances of this case as regards the promotees who have been holding the posts from a long time as stated above.

20. The decision in *A. Janardhana's case* (1983 SC 769) (supra) and the decision in *O. P. Singla's case* (AIR 1984 SC 1595) (supra) strongly support the above view. It is not necessary to refer to them in great detail since in *G. S. Lamba's case* (AIR 1985 SC 1019) (supra) the effect of the said decision is set out very clearly.

21. The decision in *Karam Pal's case* (AIR 1985 SC 774) (supra) is not of much assistance to the direct recruits. In that decision there was a specific finding that except for a period of two years i.e. in 1966 and 1970, direct recruitment had been made in accordance with the Scheme governing recruitment to the Central Secretariat Service and



that there was substantial compliance with the rules of recruitment governing that Service. The Court observed that in the absence of serious failure in implementing the relevant rules there was no ground to interfere with the inter-se seniority of the officers in the Grades concerned. Hence that decision is distinguishable of facts from the present case.

22. We are aware that the view we are taking may upset the inter as seniority between those promotees who were included in the Select Lists of 1970, 1982 and 1984 and those who were included later on or who have not been included at all till now. The existence of this possibility should not deter us from adopting a uniform rule in the case of all promotees add direct recruits to adjust the equities amongst them as regards their relative seniority in the light of the violent departure made by the Government both as regards direct recruitments and promotions which it had to make every year under the Rules. The prejudice which the promotees included in the Select Lists might suffer is marginal and has to be ignored.

23. Having given our anxious consideration to the submissions made on behalf of the parties and the peculiar facts present in this case we feel that the appropriate order that should be passed in this case is to direct the Union Government to treat all persons who are stated to have been promoted in this case to several posts in Grade IV in each of the two Services contrary

to the Rules till now as having been regularly appointed to the said posts in Grade IV under R. 8 (1) (a) (ii) and assign them seniority in the cadre with effect from the dates from which they are continuously officiating in the said posts. Even those promotees who have been selected in 1970, 1982 and 1984 shall be assigned seniority with effect from the date on which they commence to officiate continuously in the posts prior to their selection. For purposes of seniority the dates of their selection shall be ignored. To direct recruits shall be given seniority with effect from the date on which their names were recommended by the Commission for appointment to superior grade on post as provided in Cl. (b) of R. 9-C of the Rules. A seniority list of all the promotees and the direct recruits shall be prepared on the above basis treating the promotees as if they were members of the Service with effect from the date on which they are continuously officiating in the posts. This direction shall be applicable only to officers who have been promoted till now. This is the meaning of the direction given by the Court on February 1, 1984 which states 'we wish to make it clear that there is no question of any rotation system being applied under the Rules, as there exist now.' All appointments shall be made hereafter in accordance with the Rules and the seniority of all officers to be appointed hereafter shall be governed by R. 9-C of the Rules.

24. We are informed that some of the promotees and direct recruits w



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governed by this decision have been promoted to higher grades. If as a result of the preparation of the seniority list in accordance with the decision and the review of the promotions made to higher grades any of them likely to be reverted such officer shall not be reverted. He shall be continued in the higher post which he is now holding by creating a supernumerary post, if necessary to accommodate him. His further promotion shall however be given to him when it becomes due as per the new seniority list to be prepared pursuant to this decision. There shall, however, be a review of all promotions made so far from Grade IV to higher posts in the light of the new seniority list. If any officer is found entitled to be so promoted to a higher grade he shall be given such promo-

tion when he would have been promoted in accordance with the new seniority list and he shall be given all consequential financial benefits flowing therefrom. Such review of promotions shall be completed within three months and the consequential financial benefits shall be paid within three months thereafter. In giving these directions we have followed more or less the directions given in *P. S. Mahal v. Union of India*, (AIR 1984 SC 1291) (supra)

25. We direct that above directions shall be complied with within the period indicated above.

26. The petition is accordingly disposed of.

Order accordingly.



**IT IS THE ESSENCE OF DEMOCRACY  
TO OBEY  
NO MASTER BUT THE LAW**



## OBSERVATION

**Constitution of India, Art. 311 (2) Second Proviso Cl. (b) —Central Civil Services (Classification, Control and Appeal) Rules (1965), R. 19—Dispensation of enquiry under Cl. (b) —Satisfaction of authority that is not reasonably practicable to hold such inquiry—Disturbance created by employees Research and Analysis wing of Govt—Opinion of Disciplinary Authority that material witnesses would not be available due to intimidation —Dismissal of employees after dispensing with inquiry Held, dispensation was valid.**

## OBSERVED BY

Mr. V. D. Tulzapurkar; Mr. R.S. Pathak And  
Mr. D. P. Madon

Hon'ble Judges, Supreme Court of India

## IN

Civil Appeals Nos. 242 and 576 of 1982 decided on 12-9-1985 in the case of Satvir Singh and others, Appellants v. Union of India and others, Respondents.

And

the case of D. P. Vohra, Appellant v. Union of India and others, Respondents.

## TEXT

Madon, J. :—The appellants who were employed in the Research and Analysis wing, Cabinet Secretariat, Government of India were dismissed from service in the exercise of the power conferred by clause (b) of the second proviso to Art 311 (2) of the Constitution of India read with Rule 19 of the Central Civil services (Classification, Control and appeal) Rules, 1965, without giving any charge-sheet upon them and without holding any inquiry. The appellants thereupon filed in the Delhi High Court a writ petition under Article 226 of the Constitution challenging the said orders of dismissal. The said writ peti-

tion was dismissed by a Division Bench of the Delhi High Court by its judgment and order dated September 25, 1981 : (1982 Lab IC 663). It is against the said judgment and order of the Delhi High Court that the present two Appeals have been filed by Special Leave granted by this Court. Article 311 of the Constitution :

2. Prior to the amendment of the second clause of Art. 311 of the Constitution by the Constitution (Forty-second Amendment) Act, 1976, with effect from January 3, 1977, the second proviso to the said clause was the only



proviso to the said clause (2) Art. 311 as amended by the Constitution (Fifteenth Amendment) Act, 1963, and the Constitution (Forty second Amendment) Art, 1976, reads as follows :

“311. Dismissal, removal or reduction in rank of persons employed in civil capacities under the Union or a State, —

(1) No person who is a member of a civil service of the Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed.

(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges :

Provided that where it is proposed after such inquiry, to impose upon him any such penalty, such penalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person and opportunity of making representation on the penalty proposed :

Provided further that this clause shall not apply—

(a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or

(b) where the authority empow-

ered to dismiss or remove a person to reduce him in rank is satisfied for some reason, to be recorded by authority in writing, it is not reasonably practicable to hold such inquiry; or

(c) where the President or Governor, as the case may be, is satisfied that in the interest of the security of the State it is not expedient to hold an inquiry.

(3) If, in respect of any person as aforesaid, a question arises whether it is reasonably practicable to hold such inquiry as is referred to in clause (2), the decision thereon of the authority empowered to dismiss or remove such person or to reduce his rank shall be final.”

Rule 19 of the Central Civil Service (Classification, Control and Appeal) Rules 1965.

3. The Central Civil Service (Classification, Control and Appeal) Rules, 1965, have been made by the President in exercise of the power conferred by the proviso to Art 309 of the Constitution, Rule 19 of the said Rules is in substance the same as the second proviso to Article 311 (2) and provides as follows :

“19. Special procedure in certain cases.—Notwithstanding anything contained in Rule 14 to Rule 18.—

(i) where any penalty is imposed on a Government servant on the ground of conduct which has led to his conviction on a criminal charge, or

(ii) where the disciplinary au-



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**Judge**  
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is satisfied for reasons to be recorded in writing that it is not reasonably practicable to hold an inquiry in the manner provided in these rules, or

(iii) where the President is satisfied that in the interest of the security of the State, it is not expedient to hold any inquiry in the manner provided in these rules,

the disciplinary authority may consider the circumstances of the case and make such orders thereon as it deems fit:

Provided that the Commission shall be consulted, where such consultation is necessary, before any orders are made in any case under this rule."

The word "Commission is defined by clause (d) of Rule 2 as meaning "the Union public Service Commission."

The Decision in Tulsiram Patel's case.

4. It was not disputed at the hearing of these two appeals that they fall to be decided in the light of what was held in *Union of India v. Tulsiram Patel* and other connected matters, (1985) 3 SCC 98. By the decision in Tulsiram Patel's case a large number of writ petitions were filed in this Court or in various High Courts and transferred to this Court and several Appeals by Special Leave, all involving the interpretation of Arts. 309, 310 and 311 of the Constitution and in particular of the second proviso of Art. 311 (2), were disposed of by a five-Judge Constitution Bench of this Court, with one learned Judge dissenting

except as regards the interpretation to be placed upon clause (c) of the second proviso to Art. 311 (2).

5. A large number of points fell for decision in Tulsiram Patel's case. It will, therefore be convenient first to summarize topic-wise the conclusion reached by the majority in that case and then to emphasize the important rights conferred by the majority judgement upon persons who are members of a civil service of the Union of India or an All-India Service or a civil service of a State or hold a civil post under the Union of India or a State in other words, upon civil servants and thereafter to deal with the facts of the present Appeals and the contention raised at the hearing thereof.

6. The conclusions reached by the majority in Tulsiram Patel's case were:

I. The Pleasure Doctrine in the United Kingdom.

(1) The pleasure doctrine relates to the tenure of a government servant, that is, his right to continue to hold office. Under it all public officers and servants of the Crown in the United Kingdom hold their appointments at the pleasure of the Crown and their services can be terminated at will without assigning any cause.

(2) The pleasure is not based upon any special prerogative of the Crown but is based on public policy and is in public interest and for public good. The basis of the pleasure doctrine is that the public is vitally interested in the efficiency and integrity of civil services and, therefore, public policy requires



public interest needs and public good demands that civil servants who are inefficient, dishonest or corrupt or have become a security risk should not continue in service.

(3) In the United Kingdom, Parliament is sovereign and can make any law whatever and the courts have no power to declare it void. In the United Kingdom, therefore, the pleasure doctrine is subject to what may be expressly provided otherwise by legislation.

## II. The Pleasure Doctrine in India.

(4) In India the pleasure doctrine has received constitutional sanction by being enacted in Article 310 (1) of the Constitution of India. Under Art. 310 (1), except as expressly provided in the Constitution every person who is a member of a defence service or a Civil service of the Union of India or of an all-India service or holds any post connected with defence or any civil post under the Union of India holds office during the pleasure of the President and every person who is a member of a civil service of a State or holds any civil post under a State holds office during the pleasure of the Governor of the State.

(5) Thus, unlike in the United Kingdom, in India the pleasure doctrine is not subject to any law made by Parliament or a State Legislature but is subject to only what is expressly provided in the Constitution. In India, therefore, the exceptions to the pleasure doctrine can only be those which are expressly provided in the Constitution.

(6) There are several exceptions

to the pleasure doctrine expressly provided in the Constitution.

(7) Article 311, being an express provision of the Constitution, is an exception to the pleasure doctrine contained in Art. 310 (1) of the Constitution, and (1) and (2) of Article 311 restrict operation of the pleasure doctrine so far as civil servants are concerned by conferring upon civil servants the safeguards provided in those clauses.

(8) Under clause (1) of Article 311 no civil servant can be dismissed or removed from service by an authority subordinate to that by which he was appointed.

(9) Under clause (2) of Article 311 no civil servant can be dismissed or removed from service or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of such charges. By reason of the amendment made in the Constitution. (Forty-second Amendment) Act, 1976, in clause (2) of Article 311 it is now not necessary to give to a civil servant an opportunity of making representation with respect to the penalty proposed to be imposed upon him.

(10) An order of compulsory retirement from service imposed upon a civil servant by way of penalty amounts to "removal" from service and attracts the provisions of Article 311.

(11) Restrictions on the operation of the pleasure doctrine contained in legislation made by Par-



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in the United Kingdom and in cases (1) and (2) of Article 311 in India are also based on public policy and are in public interest and for public good inasmuch as they give to civil servants a feeling of security of tenure.

(12) The safeguard provided to civil servants by clause (2) of Article 311 is taken away when any of the three provisos of the second proviso (originally the only proviso) to Article 311 (2) becomes applicable.

(13) It is incorrect to say that the pleasure doctrine is a prerogative of the British Crown which has been inherited by India and transposed into the Constitution, adopted to suit the constitutional set up of the Republic of India. Authoritative judicial dicta both in England and in India, for, instance, *Antony v. Smith*, 1895 AC 229 *Dunn v. Queen*, (1896) 1 QB 116, 119-120; (1895-96) 73 LT 695 and sub nom. *Dunn v. Regem* in (1895-1899) All Rep 907, *State of Uttar Pradesh v. Ram Upadhyaya*, (1921) 2 SCR 679, *Moti Ram Deka v. General Manager, N. E. F. Railways*, *Maligaon Pandu* (1954) 5 SCR 683, 734-5 and *Roshan Tandon v. Union of India*, (1968) SCR 185, 195: (AIR 1967 SC 1889), have laid down that the pleasure doctrine and the protection afforded to civil servants by legislation in the United Kingdom and by Cls (1) and (2) of Article 311 in India are based on public policy and are in public interest and for public good. Similarly, the withdrawal of the safeguard contained in clause (2) of Article 311 by the second

proviso to the clause is also based on public policy and is in public interest and for public good.

(14) Neither Article 309 nor Art. 310 nor Article 311 sets out the grounds for dismissal removal or reduction in rank or for imposition of any other penalty upon a civil servant. These Articles also do not specify what the other penalties are. These matters are left to be dealt with by rules made under the proviso to Article 309 or by Acts referable to that Article or rules made under such Acts.

(15) The pleasure of the President or the Governor is not to be exercised by him personally. It is to be exercised by the appropriate authority specified in rules made under the proviso to Article 309 or by Acts referable to that Article or rules made under such Acts. Where, however, the President or the Governor, as the case may be, exercises his pleasure under Article 310 (1), it is not required that such act of exercise of the pleasure under Article 310 (1) must be an act of the President or the Governor himself but it must be an act of the President or the Governor in the Constitutional sense, that is, with the aid and on the advice of the Council of Ministers.

III. The Inquiry under Article 311 (2).

(16) Clause (2) of Article 311 gives a constitutional mandate to the principles of natural justice and the audi alteram partem rule by providing that a civil servant shall not be dismissed or



removed from service or reduced in rank until after an inquiry in which he has been informed of the charges against him and has been given a reasonable opportunity of being heard in respect of those charges.

(17) The nature of this inquiry has been elaborately set out by this Court in *Khem Chand v. Union of India*, 1958 SCR 1080, 1095-97 and even after the Constitution (Forty-second Amendment) Act, 1976, the inquiry required by clause (2) of Article 311 would be the same except that it would not be necessary to give to a civil servant an opportunity to make a representation with respect to the penalty proposed to be imposed upon him.

(18) As held in *Suresh Koshy George v. University of Kerala*, (1969) 1 SCR 317, 326-7 and *Associated Cement Companies Ltd. v. T.C. Srivastava*, (1984) 3 SCR 361, 369, apart from Article 311 prior to its amendment by the Constitution (Fortysecond Amendment) Act, 1976, it is not necessary either under the ordinary law of the land or under industrial law to give a second opportunity to show cause against the penalty proposed to be imposed upon an employee.

(19) If an inquiry held against a civil servant under Art. 311 (2) is unfair or biased or has been conducted in such a manner as not to give him a fair or reasonable opportunity to defend himself, the principles of natural justice would be violated; but in such a case the order of dismissal, removal or

reduction in rank would be bad as travailing the express provisions of 311 (2) and there is no scope for recourse to Art. 14 for the purpose of invalidating it.

IV. The Second Proviso to 311 (2).

(20) The language of the second proviso to Art. 311 (2) is plain and unambiguous. The key words in the second proviso are "this clause shall not apply where there is no ambiguity in these words". Where, therefore, a situation envisaged in any of the three clauses of the second proviso arises, the safeguard provided to a civil servant by Cl: (2) Art. 311 is taken away.

(21) The second proviso to 311 (2) becomes applicable in the cases mentioned in Cls. (a) to (c) of the second proviso, namely:

(a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to conviction on a criminal charge;

(b) where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing it is not reasonable or practicable to hold such inquiry; and

(c) where the President or the Governor as the case may be, is satisfied in the interest of the security of the State it is not expedient to hold such inquiry.



(22) The governing words of the second proviso to Cl. (2) of Art. 311, namely, "this clause shall not apply", are mandatory and not directory and are in the nature of a constitutional prohibitory injunction restraining the disciplinary authority from holding an inquiry under Art. 311 (2) or from giving any kind of opportunity to the concerned civil servant in a case where one of the three clauses of the second proviso becomes applicable. There is thus no scope for introducing into the second proviso some kind of inquiry or opportunity to show cause by a process of inference or implication. The maxim expression *facit cessare tacitum* "when there is express mention of certain things, then anything not mentioned is excluded") applies to the case. This well known maxim is a principle of logic and common sense and not merely a technical rule of construction as pointed out in *B. Shankara Rao Badami v. State of Mysore*, (1969) 3 SCR 1, 12.

(23) The second proviso to Art. 311 (2) has been in the Constitution of India since the time the Constitution was originally enacted. It was not blindly or slavishly copied from S. 240 (3) of the Government of India Act, 1935. There was a considerable debate on this proviso in the Constituent Assembly as shown by Official Report of the Constituent Assembly Debates vol. X, pages 1099 to 1116. The majority of the member of the Constituent Assembly had fought for freedom and

had suffered imprisonment in the cause of liberty and were, therefore, not likely to introduce into our Constitution any provision from the earlier Government of India Acts which had been enacted purely for the benefit of a foreign imperialistic power. They retained the second proviso as a matter of public policy and as being in the public interest and for public good. They further inserted Cl. (c) in the second proviso dispensing with the inquiry under Art. 311(2) in a case where the President or the Governor as the case may be, is satisfied that in the interest of the security of the State it is not expedient to hold such inquiry as also added a new clause, namely, Cl. (3), in Art. 311 giving finality authority that it is not reasonably practicable to hold the inquiry under Art. 311(2), S. 240 of the Government of India Act, 1935, did not contain any provision similar to Cl. (c) of the second proviso to Art 311(2) or Cl. (3) of Art. 311.

V. Article 14 and the Second Proviso.

(4) The principles of natural justice are not the creation of Article 14 of the Constitution. Art. 14 is not the begetter of the principles of natural justice but is their constitutional guardian.

(25) The principles of natural justice consist primarily of two main rules, namely, "*nemo iudex in causa sua*" ("no man shall be a judge in his own case") and "*audi alteram partem*" ("hear the other side"). The corollary deduced



from the above two rules and particularly the *audi alteram partem* rule was “*qui aliquid statuerit parte inaudita altera, aequum licet dixerit haud aequum fuerit*” (“he who shall decide anything without the other side having been heard although he may have said what is right will not have done what is right” or as is now expressed “justice” should not only be done but should manifestly be seen to be done”). These two rules and their corollary are neither new nor were they the discovery of English Judges but were recognised in many civilizations and over many centuries.

(26) Article 14 applies not only to discriminatory class legislation but also to arbitrary or discriminatory State action. Violation of a rule of natural justice results in arbitrariness which is the same as discrimination, and where discrimination is the result of a State action, it is a violation of Art. 14. Therefore, a violation of a principle of natural Justice by a State action is a violation of Art. 14.

(27) The principles of natural justice apply both to quasi-judicial as well as administrative inquiries entailing civil consequences.

(28) It is well established both in England and in India that the principles of natural justice yield to and change with the exigencies of different situations and do not apply in the same manner to situations which are not alike. They are neither cast in a rigid mould nor can they be put in a legal strait jacket. They are not immutable but flexible and can be adopted, modified or

excluded by statute and statutory rules as also by the constitution of the tribunal which has to decide a particular matter and the rules which such tribunal is governed. Instances of cases in which it has been held are *Norwest Holst Ltd. v. Secretary of State for Trade*, (1978) 1 Ch 227, *Suresh Koshy George v. University of Kerala*, (1969) 1 SCR 332, *A. K. Kraipak v. Union of India* (1970) 1 SCR 457, 469, *Union of India v. Col. J. N. Sinha*, (1971) 1 SCR 779 (794-95), *Swadeshi Cotton Mills v. Union of India*, (1981) 2 SCR 533, 599, *J. Mohapatra and Co. v. State of Orissa*, (1985) 1 SCR 322, 334-5 and *Maneka Gandhi v. Union of India* (1978) 2 SCR 621 681.

(29) If legislation and the necessities of a situation can exclude the principles of natural justice including the *audi alteram* rule, a fortiori so can a provision of the Constitution such as the second proviso to Art. 311 (2).

(30) The *audi alteram partem* rule having been excluded by a constitutional provision, namely, the second proviso to Art. 311, (2) there is no scope for reintroducing it by side-door to provide once again the same inquiry which the constitutional provision has expressly prohibited.

(31) A right of making a representation after an action is taken against a person has been held by this Court in *Maneka Gandhi's case* and in *Liberty C. Mills v. Union of India*, (1984) 3 SCR 465 to be a sufficient compliance with the requirements of natural justice.



case of a civil servant to whom the provisions of the second proviso to Art. (2) have been applied, he has the right of a departmental appeal in which he can show that the charges made against him are not true and an appeal is a better and more effective remedy than a writ of making a representation.

(32) The majority view in *A. K. Gopalan v. State of Madras*, 1950 SCR 130, namely, that particular Articles governing certain Fundamental Rights operate exclusively without having any interaction with any other Article in the Chapter on Fundamental Rights was disapproved and held to be not correct in *Automobile Cawasji Cooper v. Union of India*, (1970) 3 SCR 530. The position at the majority view in *Gopalan's* case was overruled in *R.C. Cooper's* case was reiterated in *Sambhu Nath Sarkar v. State of West Bengal*, (1974) 1 SCR 1. *Haradhan Saha v. State of West Bengal*, (1975) 1 SCR 778, *Khudiram Das v. State of West Bengal*, (1975) 2 SCR 832 and *Maneka Gandhi's* case. Thus, the majority view in *Gopalan's* case was buried in *R.C. Cooper's* case; its burial service was performed in *Sambhu Nath Sarkar v. State of West Bengal*, *Haradhan Saha v. State of West Bengal* and *Khudiram Das v. State of West Bengal* and its funeral oration was delivered in *Maneka Gandhi's* case; and it is to be hoped that the ghost of that majority view does not at some future time rise from its grave and stand, shaking its chains, seeking to block the forward march of our country to progress, prosperity and the establishment of a Welfare State.

(33) The decisions in *R.C. Cooper's* case and the other cases which followed it do not, however, apply where a Fundamental Right, including the *audi alteram partem* rule comprehended within the guarantee of Art. 14, is excluded by the Constitution itself. Instances of such express exclusionary provisions contained in the Constitution are Art. 31A (1), Art. 31B, Art. 31C, Art. 22 (5), and the second proviso to Art. 311 (2) as regards the *audi alteram partem* rule, namely, affording an opportunity of a hearing to a civil servant before imposing the penalty of dismissal, removal or reduction in rank upon him.

(34) The principles of natural justice must be confined within their proper limits and not allowed to run wild. The concept of natural justice is a magnificent thoroughbred on which this nation gallops forwards towards its proclaimed and destined goal of "Justice, social, economic and political". This thoroughbred must not be allowed to turn into a wild and unruly horse, careering off where it lists, unsaddling its rider and bursting into fields where the sign "no pasaran" is put up.

#### VI. Service Rules and Acts

(35) Art. 309 is expressly made subject to the provisions of the Constitution. Rules made under the proviso to Art. 309, Acts referable to that Article, and rules made under such Acts are, therefore, subject both to Art. 310 (1) as also to Art. 311. If any such rule or Act impinges upon or restricts the operation of the pleasure doctrine embodied in Art. 310 (1) except as expressly pro-



vided in the Constitutions or restricts or takes away the safeguards provided to civil servants by Cls. (1) and (2) of Art. 311, it would be void and unconstitutional as contravening the provisions of Art. 310(1) or Cl.(1) or Cl.(2) of Art. 311 as the case may be. Any such Act or rule which provides for dismissal, removal or reduction in rank of a civil servant without holding an inquiry as contemplated by Cl. (2) of Art. 311 except in the three cases specified in the second proviso to that clause would, therefore, be unconstitutional and void as contravening Art. 311 (2).

(36) In the same way, for an Act or a rule to provide that in a case where the second proviso to Art 311 (2) applies, any of the safeguards excluded by that proviso will be available to a civil servant would be void and unconstitutional as impinging upon the pleasure of the President or the Governor, as the case may be.

(37) A well-settled rule of construction of statutes is that where two interpretations are possible, one of which would preserve and save the constitutionality of the particular statutory provision while the other would render it unconstitutional and void, the one which saves and preserves its constitutionality should be adopted and the other rejected.

(38) Where an Act or a rule provides that in a case in which the second proviso to Art. 311 (2) applies any of the safeguards excluded by that proviso will be available to a civil servant the constitutionality of such provision would

be preserved by interpreting it as being directory and not mandatory. The breach of such directory provision would not, however, furnish any cause of action or ground of challenge to a civil servant because at the threshold such cause of action or ground of challenge would be barred by the second proviso to Art. 311 (2).

(39) Service rules may reproduce the provisions of the second proviso to Art. 311 (2) and authorize disciplinary authority to dispense with the inquiry as contemplated by Cl. (2) of Art. 311 in the three cases mentioned in the second proviso to that clause or any one or more of them. Such a provision, however, is not valid and constitutional without reference to the second proviso to Art. 311 (2) and cannot be read apart from it. Thus, while the source of authority for a particular officer to act as a disciplinary authority and dispense with the inquiry is derived from the service rule, the source of his power to dispense with the inquiry is derived from the second proviso to Art. 311 (2) and not from the service rule.

(40) The omission to mention in the order of dismissal, removal or reduction in rank the relevant clause of the second proviso or the relevant service rule will not have the effect of invalidating the order imposing such penalty, and the order must be read as having been made under the applicable clause of the second proviso to Art. 311 (2) read with the relevant service rule.



(41) Rule 37 of the Central Industrial Security Force Rules, 1969, is clumsy worded and makes little sense. To provide that a member of the Central Industrial Security Force who has been convicted to rigorous imprisonment on criminal charge "shall be dismissed from service" and at the same time to provide that 'only a notice shall be given to the party charged proposing the penalty of dismissal for his having been convicted to rigorous imprisonment and asking him to explain as to why the proposed penalty of dismissal should not be imposed' is a contradiction in terms. To read these provisions as mandatory would be to render them unconstitutional and void. These provisions must, therefore, be read as directory in order to preserve their constitutionality.

(42) Rule 19 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965, is identical with R. 14 of the Railway Servants (Discipline and Appeal) Rules, 1968, and the interpretation of the said Rule 19 would be the same as that of the said Rule 14.

#### VII. Challappan's case.

(43) The three-Judge Bench of this Court in *Divisional Personnel Officer, Southern Railway v. T. R. Challappan*, (1976) 1 SCR 783 : (AIR 1975 SC 2216) was in error in interpreting Rule 14 of the Railway Servants (Discipline and Appeal) Rules, 1968, by itself and not in conjunction with the second proviso to Art. 311 (2).

(44) The Court in Challappan's case also erred in holding that the addi-

tion of the words "the disciplinary authority may consider the circumstances of the case and make such order thereon as it deems fit" in the said Rule 14 warranted an interpretation of the said Rule different from that to be placed upon the second proviso to Art. 311 (2).

(45) The Court in Challappan's case also erred in the interpretation placed by it upon the word "consider" occurring in the above phrase in said Rule 14. The view taken by the Court in that case that a consideration of the circumstances of the case cannot be unilateral but must be after hearing the delinquent civil servant would render this part of the said Rule 14 unconstitutional as restricting the full exclusionary operation of the second proviso to Art. 311 (2).

(46) The word "consider" in its ordinary and natural sense is not capable of the meaning assigned to it in Challappan's case.

(47) The consideration of the circumstances under the said Rule 14 must, therefore, be ex parte and without affording to the concerned civil servant an opportunity of being heard.

(48) The decision in Challappan's case never held the field for the judgment in that case was delivered on September 15, 1975, it was reported in (1976) 1 SCR 783 : (AIR 1975 SC 2216) and hardly was that case reported, than in the next group of appeals in which the same question was raised the matter was referred to a larger Bench by an order made



on November 18, 1976, in view of the earlier decision of another three-Judge Bench in *M. Gopala Krishna Naidu v. State of Madhya Pradesh*, (1968) 1 SCR 355; (AIR 1968 SC 240). The correctness of *Challappan's* case was, therefore, doubted from the very beginning.

#### VIII. Executive Instructions.

(49) Executive Instructions stand on a lower footing than a statutory rule. Executive instructions which provide that in a case where the second proviso to Art 311 (2) applies, any safeguard excluded by that proviso would be available to a civil servant would only be directory and not mandatory.

#### IX. The Scope of the Second proviso.

(50) The three clauses of the second proviso to Art. 311 are not intended to be applied in normal and ordinary situations. The second proviso is an exception to the normal rule and before any of the three clauses of that proviso is applied to the case of a civil servant, the conditions laid down in that clause must be satisfied.

(51) Where a situation envisaged in one of the clauses of the second proviso to Art. 311 (2) exists, it is mandatory that the punishment of dismissal, removal or reduction in rank should be imposed upon a civil servant. The disciplinary authority will first have to decide what punishment is warranted by the facts and circumstances of the case. Such consideration would, how-

ever, be *ex parte* and without hearing the concerned civil servant. If the disciplinary authority comes to the conclusion that the punishment which is called for is that of dismissal, removal or reduction in rank, it must dispense with inquiry and then decide for itself which of the aforesaid three penalties should be imposed.

#### X. Clause (a) of the Second proviso.

(52) In a case where Cl. (a) of the second proviso to Art. 311 (2) applies, the disciplinary authority is to take into consideration the conviction of the concerned civil servant as sufficient proof of misconduct on his part. It has thereafter to decide whether the conduct which had led to the civil servant's conviction on a criminal charge was such as to warrant the imposition of a penalty and if so, what that penalty should be. For this purpose it must peruse the judgement of the criminal Court and take into consideration all the facts and circumstances of the case and the various factors set out in *Challappan's* case, such as, the entire conduct of the civil servant, the gravity of the offence committed by him, the impact which his misconduct is likely to have on the administration, whether the offence for which he was convicted was of a technical or trivial nature, and the extenuating circumstances, if any, present in the case. This however, has to be done by the disciplinary authority *ex-parte* and without hearing the concerned civil servant.

(53) The penalty imposed upon



civil servant should not be arbitrary, grossly excessive or out of all proportion to the offence committed or not warranted by the facts and circumstances of the case.

(54) Where a civil servant goes to the office of his superior officer whom he believes to be responsible for stopping his increment and hits him on the head with an iron rod, so that the superior officer falls down with a bleeding head, and the delinquent civil servant is arrested and convicted under S. 332 of the Indian Penal Code but the Magistrate, instead of sentencing him to imprisonment, applies to him the provisions of S. 4 of the Probation of Offenders Act, 1958, and after his conviction the disciplinary authority, taking the above facts into consideration, by way of punishment compulsorily retires the delinquent civil servant under Cl. (i) of S. 19 of the Central Civil Services (Classification Control and Appeal) Rules 1965, it cannot be said that the punishment inflicted on the civil servant was excessive or arbitrary.

XI. Clause (d) of the Second Proviso.

(55) There are two conditions precedent which must be satisfied before Cl. (b) of the second proviso to Art. 311(2) can be applied. These conditions are :

(i) there must exist a situation which makes the holding of an inquiry contemplated by Art. 311(2) not reasonably practicable, and

(ii) the disciplinary authority should record in writing its reason for its satisfaction that it is not reasonably practicable to hold such inquiry.

(56) Whether it was practicable to hold the inquiry or not must be judged in the context of whether it was reasonably practicable to do so.

(57) It is not a total or absolute impracticability which is required by Cl. (b) of the second proviso. What is requisite is that the holding of the inquiry is not practicable in the opinion of a reasonable man taking a reasonable view of the prevailing situation.

(58) The reasonable practicability of holding an inquiry is a matter of assessment to be made by the disciplinary authority and must be judged in the light of the circumstances then prevailing. The disciplinary authority is generally on the spot and knows what is happening. It is because the disciplinary authority is the best judge of the prevailing situation that Cl. (3) of Art. 311 makes the decision of the disciplinary authority on this question final.

(59) It is not possible to enumerate the cases in which it would not be reasonably practicable to hold the inquiry. Illustrative cases would be.....

(a) Where a civil servant, particularly through or together with his associates, so terrorizes, threatens or intimidates witnesses who are going to give evidence against him with fear of reprisal as to prevent them from doing so, or



(b) where the civil servant by himself or together with or through others, intimidates and terrorizes the officer who is the disciplinary authority or members of his family so that he is afraid to hold the inquiry or direct it to be held, or

(c) where an atmosphere of violence or of general indiscipline and insubordination prevails, it being immaterial whether the concerned civil servant is or is not a party to bringing about such a situation. In all these cases, it must be remembered that numbers coerce and terrify while an individual may not.

(60) The disciplinary authority is not expected to dispense with a disciplinary inquiry lightly or arbitrarily or out of ulterior motives or merely in order to avoid the holding of an inquiry or because the Department's case against the civil servant is weak and must fail.

(61) The word "inquiry" in Cl. (b) of the second proviso includes a part of an inquiry. It is, therefore, not necessary that the situation which makes the holding of an inquiry not reasonably practicable should exist before the inquiry is instituted against the civil servant. Such a situation can also come into existence subsequently during the course of the inquiry, for instance, after the service of a charge-sheet upon the civil servant or after he has filed his written statement thereto or even after evidence has been led in part.

(62) It will also not be reasonably practicable to afford to the civil servant

an opportunity of a hearing or further hearing, as the case may be, when at the commencement of the inquiry or pending it, the civil servant absconds and cannot be served or will not participate in the inquiry. In such cases, the matter must proceed ex parte and on the materials before the disciplinary authority.

(63) The recording of the reason for dispensing with the inquiry is a constitutional obligation and if such reason is not recorded in writing, the order dispensing with the inquiry and the order of penalty following thereupon would both be void and unconstitutional. It is, however, not necessary that the reason should find a place in the final order. It would be advisable to record it in the final order in order to avoid an allegation that the reason was not recorded in writing before passing the final order but was subsequently fabricated.

(64) The reason for dispensing with the inquiry need not contain detailed particulars but it cannot be vague or just a repetition of the language of Cl. (b) of the second proviso.

(65) It is also not necessary to communicate the reason for dispensing with the inquiry to the concerned civil servant but it would be better to do so in order to eliminate the possibility of an allegation being made that the reason was subsequently fabricated.

(66) The obligation to record the reason in writing is provided in Cl.



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the second proviso so that the superiors of the disciplinary authority may be able to judge whether such authority has exercised its power under Cl. (b) properly or not with a view to judge the performance and capacity of that officer for the purposes of promotion etc.

(67) It is, however, better for the disciplinary authority to communicate to the concerned civil servant its reason for dispensing with the inquiry because such communication would eliminate the possibility of an allegation being made that the reason had been subsequently fabricated. It would also enable the civil servant to approach the High Court under Art. 226 or, in a fit case, the Supreme Court under Art. 32.

(68) The submission that whereas a delinquent government servant so terrorises the disciplinary authority that neither that officer nor any other officer stationed at that place is willing to hold an inquiry, some senior officer can be sent from outside to hold the inquiry cannot be accepted. This submission itself shows that in such a case the holding of an inquiry is not reasonably practicable. It would be illogical to hold that administrative work carried on by senior officers should be paralysed just because a delinquent civil servant is terrorised by himself or alone with or through others makes the holding of an inquiry by the designated disciplinary authority or inquiry officer not reasonably practicable.

(69) In a case falling under Cl. (b) of the second proviso it is not necessary

that the civil servant should be placed under suspension until such time as the situation improves and it becomes possible to hold the inquiry because in such cases neither public interest nor public good requires that salary or subsistence allowance should be continued to be paid out of the public exchequer to the concerned civil servant. It would also be difficult to foresee how long the situation would last and when normalcy would return or be restored. In certain cases, the exigencies of a situation would require that prompt action should be taken and suspending a civil servant would not serve the purpose and sometimes not taking prompt action might result in the trouble spreading and the situation worsening and at times becoming uncontrollable. Not taking prompt action may also be construed by the trouble-makers as a sign of weakness on the part of the authorities and thus encourage them to step up their activities or agitation. Where such prompt action is taken in order to prevent this happening, there is an element of deterrence in it but this is an unavoidable and necessary concomitance of such an action resulting from a situation which is not of the creation of the authorities.

(70) The contention that where an inquiry into the charges against a civil servant is not reasonably practicable, none the less before dispensing with the inquiry there should be a preliminary inquiry into the question whether the disciplinary inquiry should be dispensed with or not is illogical and is a contradiction in terms. If an inquiry into the



charges against a civil servant is not reasonably practicable, it stands to reason that an inquiry into the question whether the disciplinary inquiry should be dispensed with or not is equally not reasonably practicable.

(71) Where a large group of members of the Central Industrial Security Force Unit posted at the plant of the Bokaro Steel Ltd., indulged in acts of insubordination, indiscipline, dereliction of duty, abstention from physical training and parade, taking out processions, shouting inflammatory slogans, participating in the 'gherao' of supervisory officers, going on hunger strike and 'dharna' near the Quarter Guard and Administrative Building of the Unit, indulging in threats of violence, bodily harm and other act of intimidation to supervisory officers and loyal members of the said Unit, and thus created a situation whereby the normal functioning of the said Unit of the Central Industrial Security Force was made difficult and impossible, the disciplinary authority was justified in applying clause (d) of the second proviso to those who were considered responsible for such acts. Cl. (b) of the second proviso to Art. 311 (2) was also properly applied in the cases of those members of the Central Industrial Security Force who were considered responsible for creating a similar situation at Hoshangabad.

(72) In cases such as the above, it is not possible to state in the order of dismissal the particular acts done by each of members of the concerned group

as such cases are very much like a case under S. 140 of the Indian Penal Code.

(73) In situation Such as the above where a large group acting collectively with the common object of coercing those in charge of the administration of the Central Industrial Security Force and the Government to compel them to grant recognition to their Association and to concede their demands, it is not possible to particularize in the order of dismissal the acts of each individual member who participated in the commission of these acts. The participation of each individual might be of a greater or lesser degree but the acts of each individual contributed to the creation of a situation in which the security force itself became a security risk.

(74) Railway service is a public utility service within the meaning of (a) of S. 2 of the Industrial Disputes Act, 1947, and the proper running of the railway service is vital of the country.

(75) Where, therefore, the railway employees went on an illegal all-India strike without complying with the provisions of S. 22 of the Industrial Disputes Act, 1947, and thereby committed an offence punishable with imprisonment and fine under S. 26 (1), of the said Act and the situation became such that railway services were paralysed, law workers and superior officers assaulted and intimidated, the country held for ransom, and the economy of the country and public interest and public good judicially affected, prompt and immediate



action was called for in order to bring the situation to normal. In these circumstances, it cannot be said that an inquiry was reasonably practicable or that Cl. (b) of the second proviso was properly applied. The fact that the railway employees may have gone on strike with the object of forcing the Government to meet their demands is not relevant because their demands are for their private gain and in their private interest and the railway employees were not entitled in seeking to have their demands conceded to cause undue hardship to the public and prejudicially affect public good and public interest and the good and interest of the nation.

(76) The quantum and extent of the penalty to be imposed in case such as the above would depend upon the gravity of the situation at a particular centre and the extent to which the acts had to be committed by particular civil servants, even though not serious in themselves, in conjunction with acts committed by others contributed to bringing about the situation. The fact, therefore, that at a particular centre certain civil servants were dismissed from service while at some other centres they were only removed from service does not mean that the penalties were arbitrarily imposed.

#### XII Clause (c) of the Second Proviso.

(77) The expression "security of the State" in Cl. (c) of the second proviso to Art. 311 (2) does not mean security of the entire country or a whole

State but includes security of a part of a State.

(71) Security of the State cannot be confined to an armed rebellion or revolt for there are various ways in which the security of the State can be affected such as by State secrets or information relating to defence production or similar matters being passed on to other countries, whether inimical or not to India, or by secret links with terrorists.

(79) The way in which the security of the State is affected may be either open or clandestine.

(80) One of the obvious acts which would affect the security of the State would be disaffection in the armed forces or para-military forces or the police force. The importance of the proper discharge of the duties by members of these Forces and the maintenance in discipline among them is emphasized of Art. 33 of the Constitution.

(81) Disaffection in any armed force or para-military force or police force is likely to spread because dissatisfied and disaffected members of such a Force spread dissatisfaction and disaffection among other members of the Force and thus induce them not to discharge their duties properly and to commit acts of indiscipline, insubordination or disobedience to the orders of their superiors. Such a situation cannot be a matter affecting only law and order or public order but is a matter vitally affecting the security of the State.

(82) The interest of the security of the State can be affected by actual



acts or even by the likelihood of such act taking place.

(83) In an Inquiry into acts affecting the interest of the Security of the State, several matters not fit or proper to be made public, including the source of information involving a civil servant in such acts, would be disclosed and thus in such cases an inquiry into acts prejudicial to the interest of the security of the State would as much prejudice the interest of the security of the State as those acts themselves would.

(84) The condition for the application of Cl. (c) of the second proviso to Art. 311 (2) is the satisfaction of the President or the Governor, as the case may be, that it is not expedient in the interest of the security of the State to hold a disciplinary inquiry.

(85) Such satisfaction is not required to be that of the President or the Governor personally but of the President or the Governor, as the case may be, acting in the constitutional sense.

(86) "Expedient" means "advantageous, fit, proper, suitable or politic". Where, therefore, the President or the Governor, as the case may be, is satisfied that it will not be advantageous or fit or proper of suitable or politic in the interest of the security of the State to hold an inquiry, he would be entitled to dispense with it under Cl. (c) of the second proviso.

(87) Under Cl. (c) of the second proviso the satisfaction reached by the President or the Governor, as the case may be, must necessarily be a subjective

satisfaction because expediency involves matters of policy.

(88) Satisfaction of the President or the Governor under Cl. (c) of the second proviso may be arrived at as a result of secret information received by the Government about the brewing danger to the security of the State in such like matters. There are other factors which are also required to be considered, weighed and balanced in order to reach the requisite satisfaction where holding an inquiry would be expedient or not. If the requisite satisfaction has been reached as a result of secret information received by the Government, making known such information would very often result in disclosure of the source of such information and if it is known the particular source from which the information was received would be more available to the Government. The reason for the satisfaction reached by the President or the Governor under Cl. (c) of the second proviso cannot, therefore, be required to be recorded in the order of dismissal, removal or reduction in rank nor can it be made public.

(89) The police are the guardians of law and order. They stand guard on the border between the green valley of law and order and the rough and barren terrain of lawlessness and public disorder, and if these guards turn law breakers and create violent public disorder they incite others to do the same one can exclaim with Juvenal, "Quis custodiet ipsos custodes?"



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“Who is to guard the guards themselves?” (Satires, VI, 347). In such a situation prompt and urgent action becomes necessary and the holding of an inquiry into the conduct of each individual member of the police force would not be expedient in the interest of the security of the State.

(90) When, therefore, a number of members of the Madhya Pradesh District Police Force and the Madhya Pradesh Special Armed Force, in order to obtain the release on bail of two of their colleagues who had been refused bail and remanded into judicial custody because of an incident which took place at the annual Mela held at Gwalior in which one man was burnt alive, indulged in violent demonstration and rioted at the Mela ground, attacked the police station at the Mela ground, ransacked it and forced the wireless operator to close down the wireless set and the situation became so dangerous that senior district and police officers had to approach the Judicial Magistrate at night to get the two arrested constables released on bail and, after discussion at a Cabinet meeting, a decision was taken and the advice of the Council of Ministers was tendered to the Governor of Madhya Pradesh who accepted it and issued orders of dismissal of these persons by applying Cl. (c) of the second proviso to them, it cannot be said that the provisions of the said Cl. (c) were not properly applied.

(91) Similarly, when after these members of the Madhya Pradesh District Police Force and the Madhya Pradesh

Special Armed Force were dismissed, some other members of these Force began carrying on an active propaganda against the Government, visiting various Places in the State of Madhya Pradesh, holding secret meetings, distributing leaflets and inciting the constabulary in these places to rise against the administration as a body in protest against the action taken by the Government and, on such information being received they were also dismissed by applying clause (c) of the second proviso to them, it cannot be said that the said Cl. (c) was not properly applied.

### XIII. Remedies available to a Civil Servant.

(92) A civil servant who has been dismissed, removed or reduced in rank by applying to his case one of the clauses of the second proviso to Art. 31 (2) or an analogous service rule has two remedies available to him. These remedies are :

(i) the appropriate departmental remedy provided for in the relevant service rules, and

(ii) if still dissatisfied, invoking the Court's power of judicial review.

### XIV. Departmental Remedies.

(93) Service rules generally provide for departmental remedies by way of an appeal, revision and review in the case of disciplinary action taken against a civil servant.

(94) Sub-clause (ii) Cl. (c) of the first proviso to R. 25 (1) of the Railway Servants (Discipline and Appeal) Rules,



1968, inter alia provides that where an inquiry has not been held, the revising authority shall itself hold such inquiry or direct such inquiry to be held, subject to the provisions of R. 4 of the said Rules which is analogous to the second proviso to Art. 322 (2). Thus, under the said Rules a railway servant has a right to demand in revision an inquiry into the charges against him subject to a situation envisaged in Rule 4 of the said Rules not prevailing at that time.

(95) Although a provision similar to sub-clause (ii) of Cl. (c) of the first proviso to R. 25 (1) of the Railway Servants (Discipline and Appeal) Rules, 1968 does not exist in the rules relating to appeals in the said Rules, having regard to the factors set out in R. 22 (2) of the said Rules which are to be considered by the appellate authority in deciding an appeal, a provision similar to the said sub-clause (ii) of Cl. (c) of the first proviso to R. 25 (1) should be read and imported into the provisions relating to appeals in the said Rules.

(96) Where service rules do not contain a provision similar to sub-clause (ii) of Cl. (c) of the first proviso R. 25 (1) of the Railway Servants (Discipline and Appeal) Rules, 1968 having regard to the factors to be taken account by the appellate authority in deciding an appeal, a provision similar to the said sub-clause (ii) of Cl. (c) of R. 25 (1) of the Railway Servants (Discipline and Appeal) Rules, 1968, should be read and imported into the provisions relating to appeals and revision contained in such

service rules. This would, however, subject to a situation envisaged by second proviso to Art. 311 (2) existing at the time of the hearing of appeal or revision.

(97) Even in a case where at time of the hearing of the appeal or revision, as the case may be, a situation envisaged by the second proviso to Art. 311 (2) exists, as the civil servant, if dismissed or removed, is continuing in service and if reduced in rank, is continuing in service with the reduced rank, the hearing of the appeal or revision, as the case may be, should be postponed for a reasonable length of time to enable the situation to return to normal.

(98) An order imposing penalty passed by the President or the Government as the case may be, cannot be challenged in a departmental appeal or revision.

(99) A civil servant who has been dismissed or removed from service or reduced in rank by applying to his case one of the clauses of the second proviso of Art. 311 (2) or of an analogous service rule has, therefore, the right in a departmental appeal or revision to a full and complete inquiry into the allegations made against him subject to a situation envisaged in the second proviso to Art. 311 (2) not existing at the time of the hearing of appeal or revision application. Even in case where such a situation exists he has the right to have the hearing of the appeal or revision application postponed for a reasonable length of time.



of the situation to become normal.

(100) In an appeal, revision or review by a civil servant who has been dismissed or removed from service or reduced in rank by applying to his case Cl. (a) of the second proviso or an analogous service rule, it is not open to the civil servant to contend that he was wrongly convicted by the criminal court. He can, however, contend that the penalty imposed upon him is too severe or excessive or was one not warranted by the facts and circumstances of the case. If he is in fact not the civil servant who was actually convicted on a criminal charge, he can contend in appeal, revision or review against such order of penalty that it was a case of mistaken identity.

(101) A civil servant who has been dismissed or removed from service or reduced in rank by applying to his case Cl. (b) of the second proviso to Art. 311 (2) or an analogous service rule can claim in appeal or revision that an inquiry should be held with respect to the charges on which such penalty has been imposed upon him unless a situation envisaged by the second proviso is prevailing at the hearing of the appeal or revision application. Even in such a case the hearing of the appeal or revision application should be postponed for a reasonable length of time for the situation to return to normal.

(102) In a case where a civil servant has been dismissed or removed from service or reduced in rank by applying clause (b) of the second proviso

or an analogous service rule to him, by reason of Cl. (3) of Art. 311 it is not open to him to contend in appeal, revision or review that the inquiry was wrongly dispensed with.

(103) In a case where a civil servant has been dismissed or removed from Service or reduced in rank by applying Cl. (c) of the second proviso or an analogous service rule to him no appeal or revision will lie if the order or penalty was passed by the President or the Governor. If, however, the inquiry has been dispensed with by the President or the Governor and the order of penalty has been passed by the disciplinary authority (a position envisaged by Cl. (iii) of Rule 14 of the Railway Servants (Discipline and Appeal) Rules, 1968, and Cl. (iii) of R. 19 of the Central Civil Services Classification, Control and Appeal) Rules, 1965); a departmental appeal or revision will lie. In such an appeal or revision, the civil servant can ask for an inquiry to be held into his alleged conduct unless at the time of the hearing of the appeal or revision a situation envisaged by the second proviso to Art. 311 (2) is prevailing. Even in such a situation the hearing of the appeal or revision application should be postponed for reasonable length of time for the situation to become normal. The civil servant, however, cannot contend in such appeal or revision that the inquiry was wrongly dispensed with by President or the Governor.

#### XV. Judicial Review.

(104) Where a clause of the second



proviso to Art. 311 (2) or an analogous service rule is applied on an extraneous ground or a ground having no relation to the situation envisaged in such clause or rule, the action of the disciplinary authority in applying that clause would or rule be mala fide and, therefore bad in law and the Court in exercise of its power of judicial review would strike down both the order dispensing with the inquiry and the order of penalty following there upon.

(105) Where a civil servant has been dismissed or removed from service or reduced in rank by applying Cl. (a) of the second proviso to Art. 311 (2) or an analogous service rule and he invokes the Court's power of judicial review, if the Court finds that the penalty imposed by the impugned order is arbitrary or grossly excessive or out of all proportion to the offence committed or was not warranted by the facts and circumstances of the case or the requirements of the particular government service to which the concerned civil servant belonged, the Court will strike down the impugned order. In such a case, it is, however, not necessary that the Court should always order reinstatement. The Court can instead substitute a penalty which in its opinion would be just and proper in the circumstances of the case. If, however, the Court finds that he was not in fact the civil servant who was convicted, it will strike down the impugned order of penalty and order his reinstatement.

(106) In the case of a civil servant

who has been dismissed or removed from service or reduced in rank by applying Cl. (b) of the second proviso to Art. 311 (2) or an analogous service rule, the High Court under Art. 226 or the Court under Art. 32 will interfere on grounds well-established in law for exercise of its power of judicial review in matters where administrative discretion is exercised.

(107) The finality given by Cl. (b) of Art. 311 to the disciplinary authority's decision that it was not reasonably practicable to hold the inquiry is not binding upon the Court and the Court will consider whether Cl. (b) of the second proviso or an analogous service rule has been properly applied or not.

(108) In examining the relevancy of the reasons given for dispensing with the inquiry the Court will consider the circumstances which, according to the disciplinary authority made it come to the conclusion that it was not reasonably practicable to hold the inquiry. If the Court finds that the reasons are irrelevant, the order dispensing with the inquiry and the order of penalty following upon it would be void and the Court will strike them down. In considering the relevancy of the reasons given by the disciplinary authority, the Court will not, however, sit in judgement over the reasons like a Court of first appeal or order to decide whether or not the reasons are germane to Cl. (b) of the second proviso or an analogous service rule. The Court must put itself in the place of the disciplinary authority and consider what in the then prevailing situation



reasonable man acting in a reasonable manner would have done. It will judge the matter in the light of the then prevailing situation and not as if the disciplinary authority was deciding the question whether the inquiry should be dispensed with or not in the cool and detached atmosphere of a Court-room, removed in time from the situation in question. Where two views are possible, the Court will decline to interfere.

(109) where it is alleged that Cl. (c) of the second proviso or an analogous service rule was applied mala fide, the Court will examine the charges of mala fides. A mere allegation of mala fides without any particulars of mala fides will not, however, amount to a plea of mala fides and requires to be proved.

(110) If the reasons for dispensing with the inquiry are not communicated to the concerned civil servant and the matter comes to court the Court can direct the reasons to be produced and furnished to the civil servant and if still not produced a presumption should be drawn that the reasons were not recorded in writing and the impugned order would then stand invalidated. Such presumption can however, be rebutted by a satisfactory explanation for the non-production of the written reasons.

(111) Where a civil servant is dismissed or removed from service or reduced in rank by applying Cl. (c) of the second proviso or an analogous service rule to his case, the satisfaction of the President or the Governor that it is not expedient

in the interest of the security of the State to hold an inquiry being a subjective satisfaction would not be a fit matter for judicial review.

(112) It is not necessary for the Court to decide the question whether the satisfaction of the President or the Governor has been reached mala fide or is based on wholly extraneous or irrelevant grounds in a case where all the materials including the advice of the Council of Ministers have been produced and such materials show that the satisfaction of the President or the Governor was neither reached mala fide nor was it based on any extraneous or irrelevant ground.

(113) By reason of the express provision of Art. 74(2) and Art. 163(3) of the Constitution the question whether any, and if so what, advice was tendered by the Ministers to the President or the Governor, as the case may be, cannot be inquired into by any Court.

(114) Whether the Court should order production of the materials upon which the advice of the Council of Ministers to the President or the Governor, as the case may be was based in order to determine whether the satisfaction of the President or the Governor was arrived at mala fide or was based on wholly extraneous or irrelevant grounds would depend upon whether the documents fall within the class of privileged documents and whether in respect of them privilege has been properly claimed or not.



7. In *Tulsiram Patel's* case where appeals filed by certain dismissed members of the Central Industrial Security Force had not been disposed of by the appellate authority the majority judgement directed the appellate authority to dispose of such appeals as expeditiously as possible. In those matters where civil servants had been dismissed or removed from service by applying to their cases Cl. (b) of the second proviso to Art. 311 (2) or an analogous service rule, the Court gave such civil servants time to file appeals and directed the concerned appellate authority to condone in the exercise of its power under the relevant service rule, the delay in filing such appeals.

8. It is important to note that the majority judgement in *Tulsiram Patel's* case is more beneficial to civil servants and confers greater rights upon them than *Challappan's* case (AIR 1975 SC) 2216 did. According to *Challappan's* case, a civil servant to whom a service rule analogous to the second proviso to Art. 311 (2) is sought to be applied has only the right to be heard with respect to the penalty proposed to be imposed upon him. The majority judgement in *Tulsiram Patel's* case has however, conferred upon the civil servants who have been dismissed or removed from service or reduced in rank by applying the second proviso to Art. 311 (2) or an analogous service rule the right to full and complete inquiry in an appeal or revision unless a situation envisaged by the second proviso is prevailing at the time of the hearing of the appeal or revision application. Even in such a situation under the majority judgement the hearing of appeal or revision application is not postponed for a reasonable length of time for the situation to become normal.

Facts of the Two Civil Appeals.

9. Having seen what was decided in *Tulsiram Patel's* case we now turn to the facts of the two Civil Appeals before us. The facts of both these Appeals are common. All the Appellants were employees of the Research and Analysis Wing ("RAW", in short), Cabinet Secretariat, Government of India.

10. In 1904 an Intelligence Bureau had been formed which was reorganised in 1958. Originally the Intelligence Bureau was concerned both with domestic and international intelligence. In 1948 a branch of the Intelligence Bureau was set up as a separate department and the Intelligence Bureau since that time has been concerned with only domestic affairs while the RAW was concerned with international affairs and under-cover activities pertaining to national security. Certain cadres of employees of the RAW formed an Association under the name of "The Cabinet Secretariat (Research and Analysis Wing) Employees Association (Regd)." The said Association submitted a charter of demands. We are not concerned in these Appeals with the reasonableness or otherwise of the demands.

11. Earlier, the different branches and departments of the RAW in Delhi were scattered in several buildings.



**D. P. Madon****Judge****Supreme Court of India**

ately, a new building was constructed for the RAW at Lodhi Road. In this building the Counter Intelligence Section ("CIS", for short) was located. The other departments were located in the South Block and at R. K. Laxmi Narayan Building. After the CIS was shifted to the building at Lodhi Road, strict security measures were introduced and employees, when going from one building to the other had to show their cards. This was resented by the employees and they demanded the withdrawal of the security regulation and insisted that the identification check should be made only at the time of entering the buildings. This demand can only be characterized as completely unreasonable. The RAW is a security and intelligence section of the Government of India dealing with many sensitive matters affecting national security and relations with other countries including counter intelligence. The basic principle of intelligence work is that no person engaged in it should know more than what he needs to know. It is this reason that when an outside agent is employed for espionage, care is taken to see that he does not know who his real employers are but knows only the name of his contact man which name is generally an alias. Employees of an intelligence service cannot, therefore, be the best judges of what security measures should be taken to prevent secrets from leaking.

12. To return to our narrative, in the forenoon November 27, 1980, a number of staff members collected in the corridors leading to the CIS rooms, protesting

against the said security regulation and demanding its immediate withdrawal. All attempts to pacify them proved unsuccessful. More and more employees joined them and they turned aggressive, breaking into the various rooms of the CIS unit. Several persons forced their entry into the room of the Director (CIS) and forced him as also the Assistant Director and the Security Field Officer who were in the room to stand in a corner and did not allow them to move from the spot but kept them as hostages in order to have their demand conceded. The employees who had gathered there shouted slogans against the organization and its officers. These slogans were obscene, abusive, threatening, and personal in nature. All attempts made by senior officers to pacify them proved unsuccessful and the employees made it clear that they would not let the said three officers go unless the Director of the Counter Intelligence Section announced the withdrawal of the said security regulation. This state of affairs continued until late in the evening. Ultimately, the local police were sent for and about 8.30 p.m. the local police entered the premises and went to the galleries in front of the CIS branch. Some of the agitators who were in the gallery escaped. Those inside the said room closed the door to prevent the police party from entering it but the police forced open the door and rescued the said three officers. Thirty-one agitators who were found inside the room were arrested and har-



ged under Ss. 342, 506, 353, 186, 332 and 333 of the Indian Penal Code and S. 7 of the Criminal Law Amendment Act, 1952. They were subsequently released on bail by the Judicial Magistrate. These arrested employees were suspended under Cl. (b) or sub-rule (1) of R. 10 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965, as a criminal case against them was under investigation.

13. The next day, namely, on November 28, 1980, the agitation continued and many employees did not perform their duties. Instead, they collected inside the building and in the premises in groups stopping work in many branches. A large number of them went round shouting slogans and made speeches in the corridors of the office. On November 29, 1980, a letter was issued by the said Association demanding the immediate withdrawal of the criminal cases against the said employees as also of the said security regulation. The letter stated that unless these demands were met, the employees would go on a pen-down strike with immediate effect. Thereupon, orders of suspension were issued against those who were taking a leading, active and aggressive role in the agitation and indulging in these activities. The said suspension orders were issued from the 1st December 1980 onwards but the down strike continued and spread to other offices of the RAW in New Delhi as well as in different parts of India including Lucknow and Jammu. Daily the situation worsened. There was com-

plete insubordination and total breakdown of discipline. The atmosphere was charged with tension and there did not seem any hope of the situation becoming normal. Ultimately, the appellants in Civil Appeal No. 242 of 1982 and the sole appellant in Civil Appeal No. 576 of 1982 were dismissed by orders dated December 6, 1980, without holding any inquiry by applying to them Cl. (b) of the second proviso to R. 311 (2) read with R. 19 of the said Rules. Thereupon a writ petition was filed in the Delhi High Court. At the date of the filing of the said writ petition, the appellants Nos. 1 to 3 in Civil Appeal No. 242 of 1982 had been served with the orders of dismissal, while the remaining appellants and respondents Nos. 4 to 44 in Civil Appeal No. 242 of 1982 joined in the said writ petition as co-petitioners together with the Combi Secretariat (Research and Analysis Wing) Employees Association (Regd), contending that similar action of dismissal was being apprehended by them. Pending the said writ petition the orders of dismissal were also served upon the remaining appellants. During the course of the hearing of the said writ Petition a statement was made to the High Court on behalf of the Union of India that the other petitioners would not be dismissed without holding a regular inquiry. The said writ petition, therefore, proceeded only so far as the appellants in these two Appeals were concerned. A Division Bench of the Delhi High Court dismissed the writ petition by its judgement and



**D. P. Madon**  
**Judge**  
**Supreme Court of India**

dated September 25, 1981.

It is against this judgement and order of the said High Court, that these two appeals by Special Leave have been preferred.

The Impugned Orders of Dismissal dated 14. All the eight impugned orders of dismissal were in identical terms and tenor, therefore be sufficient to reproach the order of dismissal passed against the First Appellant in Civil Appeal No. 242 of 1982. The said order reads as follows.

“No 3/ADMN/80-6486 (N)  
 Government of India  
 Cabinet Secretariat,  
 Room No 8-B, South Block  
 New Delhi, the 6th Dec., 1980  
**ORDER**

Where as a large number of employees of the Cabinet Secretariat (R & AW) stationed at Delhi have for some time past been indulging in various acts of misconduct, indiscipline, intimidation and insubordination, such as abstaining from work, wilful neglect of the duties assigned to them and disobedience lawful instructions and orders of the official superiors;

and whereas the said employees are continuously holding meetings and demonstrations unauthorisedly and in violation of specific orders, within the office premises and its precincts.

and whereas the said employees have resorted to coercion, intimidation and incitement of other fellow employees which has a serious demoralizing effect on the members of the organiza-

tion and whereas such of the said employees is unbecoming of a Government servant and is in gross violation of the Central Civil Services (Conduct) Rules, 1964.

and whereas Shri Satyavir Singh, Field Assistant, is one of the said employees actively participating in such activities;

and whereas due to the practice of coercion, intimidation and such like threats and postures adopted by the said employees the atmosphere is so tense and abnormal that no witness will co-operate with any proceedings in accordance with provisions of the Central Civil Services (Classification, Control and Appeal) Rules, 1965;

and whereas I am satisfied that the circumstances are such that it is not reasonably practicable to hold a regular enquiry as contemplated by the Central Civil Services (Classification, Control and Appeal) Rules, 1965;

and whereas on a consideration of the facts and circumstances of the case, I am satisfied that the penalty of dismissal from service should be imposed on Shri Satyavir Singh, Field Assistant;

Now, therefore, in exercise of the powers under the proviso (b) of Cl. (2) of Art 311 of the Constitution read with R. 19 of the Central Civil Services (Classification Control and Appeal) Rules, 1965, I as the appointing authority do hereby dismiss Shri Satyavir Singh from the post of Field Assistant in the R. and AW with effect from the forenoon of December 6, 1980.



Sd/-  
6-12-80  
(H.N.KAK  
Joint Director"

### Contentions

15. Though several contentions were raised in the said writ petition, in view of the judgement in Tulsiram Patel's case (AIR 1985 SC 1416) the only contention taken at the hearing of these two Appeals was that the said order of dismissal were passed mala fide and the reasons given therein for dispensing with the inquiry were not true and that an inquiry was reasonably practicable. Several points were urged in support of this contention.

16. The first point was that the orders of suspension showed that a disciplinary inquiry was in fact contemplated and, if so, nothing had happened between the date of the orders of suspension and the date of the orders of dismissal to come to the conclusion that the inquiry was not reasonably practicable. Each order of suspension stated that the concerned employee was being suspended in the exercise of the powers conferred by R. 10 (1) of the said Rules because a disciplinary proceeding against him under R. 14. of the said Rules contemplated Cl. (a) of R. 10 (i) confers power upon a disciplinary authority to place the government servant under suspension where a disciplinary proceeding against him is contemplated or is pending. Rule 14 prescribes the procedure for imposing major penalties. One of the major penalties set out in R. 11 is the penalty

of dismissal from service. It is clear that at the date of the order of suspension disciplinary proceedings against the Appellants was in contemplation. This, however, does not mean that the situation will continue to be the same and that at no time thereafter will the holding of the inquiry become "not reasonably practicable". As pointed out in Tulsiram Patel's case, it is not necessary that a situation which makes the holding of an inquiry not reasonably practicable should exist before the disciplinary inquiry is initiated because a situation which renders the holding of an inquiry not reasonably practicable can come into being even during the course of an inquiry. The affidavits filed in the High Court clearly show that the situation had so changed after the orders of suspension were issued against the Appellants that it was not reasonably practicable to hold any inquiry against the Appellants. The all-India open-down strike was spreading. More and more centres in India were joining in the said strike. The position was fast deteriorating. Employees were being instigated into further acts of indiscipline and insubordination and lower employees and senior officers were being intimidated. Meetings and demonstrations were regularly being held within the office premises and their precincts and there was no possibility of a witness coming forward to give evidence against the Appellants who were said to have taken a leading part in this agitation. It is also pertinent to note that when the first batch of dismissal orders



erved upon some of the Appellants December 8, 1980, the pen-down was called off on December 9, 1980. Such a situation as was then prevailing prompted and urgent action was required to bring the situation under control.

As pointed out in *Tulsiram Patel's* (AIR 1985 SC 1416), sometimes taking prompt action may result in trouble spreading and the situation worsening and at times becoming uncontrollable, and may at times be also caused by the trouble-makers and agitators as a sign of weakness on the part of the authorities and encourage them to step up the tempo of their activities or agitation. The affidavits filed in the Court clearly show that is exactly what happened when the suspensions were issued and that what was required was prompt and urgent action against those who were considered to be ring leaders and that once such action was taken the situation improved and started becoming normal.

17. The next point which was urged was that while eight employees were dismissed for their part in the agitation which took place in Delhi, in respect of the agitation which took place in the Lucknow office of the RAW only two employees of that office were dismissed and therefore, there was no application of the law on the part of the disciplinary authority. It is very difficult to understand this argument. We do not know how (we know?) what precisely the situation in Lucknow was and how many employees were actively engaged in leading the agitation, and the fact that it was

thought fit to dismiss only two employees of the Lucknow Office cannot lead to the conclusion that the Appellants were wrongly dismissed without any application of mind.

18. The next point which was urged was that even on December 6, 1980, a suspension order was issued against one of the employees and that on December 9, 1980, suspension orders were issued against two other employees, and that the issuance of these suspension orders on the 6th and 9th December show that the holding of the inquiry was reasonably practicable. As the charge-sheets issued against these three employees show, these employees were working in the R. K. Puram Office and are not alleged to have taken any leading part in the agitation or in bringing about the atmosphere of violence, insubordination and indiscipline.

19. The next point was that it was not alleged by the authorities that anyone was physically injured in the agitation. This is another argument which is difficult to understand. As held in *Tulsiram Patel's* case (AIR 1985 SC 1416) it will not be reasonably practicable to hold an inquiry where an atmosphere of violence or of general indiscipline and insubordination prevails. It is, therefore, not necessary that the disciplinary authority should wait until incidents take place in which physical injury is caused to others before dispensing with the inquiry.

20. It was next submitted that



after the suspension orders, the Appellants were prohibited from visiting any of the Cabinet Secretariate Offices except for the purpose of collecting their dues and that to with prior permission and that, therefore, they could not have held any meeting or demonstration inside the office premises. There is no substance in the submission. The admitted position is that the Appellants were regularly coming to the office building and talking with other employees over the wall and at the gate twice a day at 11.30 a.m. and 3.30 p.m. and were making inflammatory speeches and holding out threats.

21. The point which was next urged in support of the contention that the impugned orders were passed mala-fide was that even though co-workers may not have been available as witnesses, there were police men and police officers posted inside and outside the building and they were available to give evidence and that superior officer were also available to give evidence. The crucial and material evidence against the Appellants would be that of their co-workers for these co-workers were directly concerned in and were eye-witnesses to the various incidents. Where the disciplinary authority feels that crucial and material evidence will not be available in an inquiry because the witnesses who could give such evidence are intimidated and would not come forward and the only evidence which would be available, namely, in this case, of policemen, police officers and senior officers, would only be

peripheral and cannot relate to charges and that, therefore, only such evidence may be assailable by a Court of law as bring a mere periphery of an inquiry and a deliberate attempt to keep back material witnesses. If disciplinary authority would be justified in coming to the conclusion that the inquiry is not reasonably practicable. The affidavit filed by the Joint Director, Research and Analysis Wing, Cabinet Secretariat. Hari Narain Kakkar, had passed the impugned orders and set out in detail the various acts of intimidation, violence and incitement committed by each of the Appellants. Copies of the written reasons for disposing with the inquiry in the case of the Appellants have also been annexed to the said affidavit. It is clear from a perusal of the said affidavit and its annexures that the police officers, policemen and senior officers could have possibly given evidence with respect to all these acts. The said affidavit further states that the senior officers were also intimidated and threatened with dire consequences if they gave evidence. Further, grievances were made against the senior officers of the RAW in the said charter of demands submitted by the said Association and the evidence of senior officers would have been attacked as biased and partisan. There is no substance in this point also.

22. The last point which was urged was that D. P. Vohra, the Appellant in Civil Appeal No. 576 of 1982, was posted at Jammu and could not,



e, have taken any active part in the agitation which took place in Delhi. His submission is completely belied by the said affidavit of Hari Narain K. The said affidavit shows that during the relevant time. Vohra had taken leave for personal reasons and had come down to Delhi and had played an active role in the said agitation. He made inflammatory speeches on the 1st, 2nd, 4th and 5th of December, 1980 and had instigated the other employees to continue the agitation and intimidated those who had not joined in the agitation to doing so. In a speech made by him on December 4, 1980; he had tried to make public some of the top secret operations of the RAW claiming to have special knowledge of these operations by virtue of having been posted earlier in a sensitive branch. He was also actively engaged in collecting funds for continuing the agitation.

23. We are, therefore, of the opinion that Cl. (b) of the second proviso to Art. 311 (2) and Rule 19 of the Central Civil Services (Classification and Appeal) Rules, 1963, were properly applied to the case of each of the Appellants and the impugned orders of

dismissal were validly passed against them.

#### Final Orders

24. In the result, both these Appeals fail and are dismissed and the interim orders passed in these Appeals are hereby vacated. If any payment has been made to any of the Appellants in pursuance of any interim order, such Appellant will not be liable to refund such amount or any part thereof. The Appellants have a right to file a departmental appeal under the Central Civil Services (Classification, Control and Appeal) Rules, 1985. In case they desire to file such an appeal, we give them time until October 31, 1985, to do so and we direct the appellate authority to condone in the exercise of its power under the proviso to Rule 25 of the said Rules the delay in filing the appeal and to hear and dispose of such appeals expeditiously subject to what has been laid down in *Tulsiram Patel's* case (AIR 1985 SC 1416) and summarized in the earlier part of this judgement.

25. There will be no order as to the costs of these Appeals.

Order accordingly.



IT IS THE ESSENCE OF DEMOCRACY  
TO OBEY  
NO MASTER BUT THE LAW



**O. Chinnappa Reddy**  
**Judge**  
**Supreme Court of India**

### OBSERVATION

**equal pay for equal work” — Doctrine of, is required to be applied to per-  
 employed on a daily wage basis — They are entitled to same wages as are  
 to similarly employees — Constitution of India, Art. 39.**

### OBSERVED BY

**Mr. O. Chinnappa Reddy and**  
**Mr. V. Balakrishna Eradi**  
**Hon’ble Judges, Supreme Court of India**

### IN

**Writ Petition (Civil) Nos. 59-60 and 563-70 of 1983 decided on 17-1-1986 in the  
 of Surinder Singh and another, Petitioners v. The Engineer Chief, C.P.W.D., and  
 s, Respondent.**

### TEXT

**O. Chinnappa Reddy, J. :—**In these writ petitions, the petitioners who employed by the Central Public Works Department on a daily-wage basis who have been so working for several years, demand that they should be the same wages as permanent employees employed to do identical work. I state that even if it is not possible to employ them on regular and permanent basis for want of a suitable number of posts, there is no reason whatsoever they should be denied ‘equal pay for equal work’. In a similar petition filed by employees of the Nehru Yuvak Kendras Civil writ Petitions Nos. 4821 and 4822 of 1983, Dhirendra Chameli & Anr. vs. State of U. P., a Bench of this court consisting of Bhagwati, C. J. and Amal Nath Sen, J. issued the following observations :

“We, therefore, allow the writ petitions and make the rule absolute and direct the Central Government to accord to these persons who are employed by the Nehru Yuvak Kendras and who are concededly performing the same duties as class IV employees, the same salary and conditions of service as are being received by class IV employees, except regularisation which cannot be done since there are no sanctioned posts. But we hope and trust that posts will be sanctioned by the Central Government in the different Nehru Yuvak Kendras, so that these persons can be regularised. It is not at all desirable that any management and particularly the central Government should continue to employ persons on casual basis in organisations which have been in existence for over 12 years. The salary



and allowances of class IV employees shall be given to these persons employed in Nehru Yuvak Kendras with effect from the date when they were respectively employed."

Earlier the court also observed that it was a peculiar attitude to take on the part of the Central Government to say that they would pay only daily-wages and not the same wages as other similarly employed employees, though all of them did identical work. The court said :

"This argument lies ill in the mouth of the Central Government for it is an all too familiar argument with the exploiting class and a Welfare State committed to a socialist pattern of society cannot be permitted to advance such an argument. It must be remembered that in this country where there is so much unemployment, the choice for the majority of people is to starve or to take employment on whatever exploitative terms are offered by the employer. The fact that these employees accepted employment with full knowledge that they will be paid only daily wages and they will not get the same salary and conditions of service as other class IV employees, cannot provide an escape to the Central Government to avoid the mandate of equality enshrined in Article 14 of the Constitution. This Article declares that there should be equality before law and equal protection of the law and implicit in it is the further principle that there must be equal Pay for work of equal value. ....It makes no

difference whether they are appointed to sanctioned posts or not. So long as they are performing the same work, they must receive the same salary and conditions of service as Class IV employees."

One would have thought that the judgement in the Nehru Yuvak Kendra case (Supra) concluded further argument on the question. However, V. C. Mahajan, learned counsel for the Central Government reiterated the argument and also contended that the doctrine of 'equal pay for equal work' was a mere abstract doctrine and it was not capable of being enforced by a court of law. He referred us to the observations of this court in *K. Mohanlal Baxshi v. Union of India*, AIR 1962 LC 1139. We are not surprised that such an argument should be advanced on behalf of the Central Government 36 years after the passage of the Constitution and 11 years after the Forty-Second Amendment proclaiming India as a socialist republic. The Central Government like all organs of the State is committed to the Directive Principles of State Policy and Article 14 enshrines the principle of equal pay for equal work. In *Randhir Singh v. Union of India*, (1982) 3 SCR 298 : 1982 SC 879, this court had occasion to explain the observations in *K. Mohan Lal Bakshi v. Union of India* (supra) and to point out how the principle of equal pay for equal work is not an abstract doctrine and how it is a vital and vigorous doctrine accepted throughout the world, particularly



**O. Chinnappa Reddy**  
**Judge**  
**Supreme Court of India**

socialist countries For the benefit of these that do not seem to be aware of it, we may point out that the decision in *Randhir Singh's* case has been followed in any number of cases by this Court and has been affirmed by a Constitution Bench of this court in *D. S. Kulkarni v. Union of India*, (1983) 2 SCR 1013. The Central Government, the State Governments and likewise, all public sector undertakings are expected to adopt a similar model and enlightened employers and arguments such as those which were advanced before us that the principle of equal pay for equal work is an abstract doctrine which cannot be enforced in a court of law should well come from the mouths of the State and Public Undertakings. We allow both the

writ petitions and direct the respondents, as in the *Nehru Yuvak Kendra's* case (*supra*) to pay to the petitioners and all other daily rated employees, the same salary and allowances as are paid to regular and permanent employees with effect from the date when they were respectively employed. The respondents will pay to each of the petitioners a sum of Rs. 1000/- towards their costs. We also record our regret that many employees are kept in service on a temporary daily wage basis without their services being regularised. We hope that the Government will take appropriate action to regularise the services of all these who have been in continuous employment for more than six months.

Petitions allowed.



IT IS THE ESSENCE OF DEMOCRACY  
TO OBEY  
NO MASTER BUT THE LAW



## OBSERVATION

**Constitution of India, Arts. 341, 14—Constitution (Scheduled Castes) order, 1950 Para 3—Scheduled Castes member converting to Christianity—Disabilities and handicaps do not continue after conversion Order is not discriminatory.**

## OBSERVED BY

Mr. P. N. Bhagwati, Mr. R. S. Pathak and  
Mr. Amarendra Nath Sen  
Hon'ble Judges, Supreme Court of India

## IN

Writ Petitions. Nos. 9596 of 1983 and 1017 of 1984, decided on 30-9-1985 in the case of Soosai etc., Petitioners v. Union of India and others, Respondents.

## And

Movement for Protection of Human Rights of Marginalised Communities through its Secretary, Petitioner v. Union of India and others, Respondents.

## TEXT

Pathak, J.:—This and the connected writ petitions raise the important question whether the Constitution (Scheduled Castes) order, 1950 is constitutionally invalid on the ground that only Hindu or Sikh members of the castes enumerated in the Schedule to that order are deemed to be Scheduled Castes for the purposes of the Constitution of India.

2. The petitioner Soosai (in Writ Petition No. 9596 of 1983) states that he belongs to the Adi-Dravida Community and is a convert to Christianity. He is a cobbler by profession and works on the roadside at one of the cross-roads in Madras. In May, 1982, the officers of the Tamil Nadu khadi and village Industries Board surveyed the sites on

which cobblers were working, including the place occupied by the petitioner, and subsequently on July 27, 1982 several cobblers were allotted bunks free of cost by the Regional Deputy Director, khadi and village Industries Board. The petitioner was not. On enquiry the petitioner came to know that the allotment of bunks free of cost was consequent to a proposal under the special Central Assistance Scheme of the Government of India for the welfare of Scheduled Castes. The funds for the purpose were provided from the special Central Assistance of the Government of India set up for giving effect to schemes exclusively intended for Scheduled Castes under G. O. Ms. No. 580 Social Welfare Department dated February 13, 1982. It is pointed out that this Order



specifically states that persons belonging to the Scheduled Castes and converted to Christianity are not eligible for assistance under the scheme. The petitioner points out that the said order has been made in consonance with the Constitution (Scheduled Castes) order, 1960, which specifically declares that no person who professes a religion different from the Hindu or the Sikh religion shall be deemed to be a member of scheduled Castes. The petitioner assails the validity of that order on the ground that it violates Arts. 14, 15 and 25 of the Constitution.

3. The essence of the petitioner's case is that he was a Hindu belonging to the Adi-Dravida caste and on conversion to Christianity he continues as a member of that caste. The Adi-Dravida caste is one of the castes enumerated in the Schedule to the Constitution (Scheduled Castes) order, 1950. The petitioner alleges that he has been denied the benefit of welfare assistance intended for Scheduled Castes on the ground that he professes the Christian religion, and he contends that inasmuch as such discrimination has been effected pursuant to the provision contained in paragraph 3 of the Constitution (Scheduled Castes) Order, 1950, that provision is constitutionally invalid. The petitioner invokes Art. 14, which is the Central provision in the Constitution guaranteeing the right to equality before the law and equal protection of the laws, and Cl. (1) of Art. 15 which prohibits the State from discriminating against any

citizen on the ground only, and not on the ground of religion. It is pointed out that when Cl. (4) of Art. 15 permits the State to make special provision notwithstanding the prohibition contained in Cl. (1) of Art. 15, to make special provision for the advancement of socially and educationally backward classes of citizens and for the Scheduled Castes and Scheduled Tribes, it envisages a special provision for the advancement of all members of such backward classes of citizens, Scheduled Castes and Scheduled Tribes. If any discrimination is exercised between the members of a Scheduled Caste on the ground of religion only so as to promote the welfare of one group of members and deny it to the others the denial will be invalid. Reference has also been made to Art. 25 on the ground that a Christian convert will be tempted to reconvert to Hinduism or Sikhism in order to benefit from the constitutional provisions relating to Scheduled Castes and therefore paragraph 3 in its operation denies him freedom of conscience and the right freely to profess, practise and propagate his religion.

4. The framers of the Constitution have taken great care to ensure that sufficient is made for ameliorating the conditions of certain backward classes found in India who suffer from social and economic disabilities. Art. 46 enjoins upon the State, as a Directive Principle of State Policy, to promote with special care the educational and economic interests of the weaker sections of the people, and



icular of the Scheduled Castes and Scheduled Tribes, and to protect them from social injustice and forms of exploitation. In consonance with this object they enacted a number of provisions in the Constitution, of which Cl. (4) or Cl. 15 is one. Besides, although Cl. (1) of Art 16 guarantees equality of opportunity to all citizens in matters relating to employment or appointment to any office under the State, there is Cl. (4) of Art. 16 which lays down that nothing in Art. 16 shall prevent the State from making any special provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State. Art. 17 abolishes "Untouchability" and forbids its practice in any form, and declares that the enforcement of any disability arising out of "Untouchability" will be an offence punishable in accordance with law. There are other provisions, such as Art. 330 which provides for the reservation of seats in the House of the People for Scheduled Tribes and Art. 332 which makes similar provision for the reservation of seats for them in the State Legislative Assemblies. We are concerned here with the advantages and benefits envisaged by the Constitution in respect of members of the Scheduled Castes.

5. The expression "Scheduled Castes" is defined in Cl. 24 of Art. 366 to mean "such castes, races or tribes or parts of or groups within such castes, races or tribes as are deemed under Art. 341 to be Scheduled Castes for the purposes of this Constitution". Clause (1)

of Art. 341 enjoins upon the President to specify by public notification the castes, races or tribes, which for the purposes of the Constitution are deemed to be Scheduled Castes in relation to a State or Union territory. Once such notification is issued by the President it cannot be varied by any subsequent notification except that, by virtue of Cl. (2) of Art. 341, Parliament may by law include in or exclude from the list of Scheduled Castes specified in the notification issued under Cl. (1) any caste, race or tribe or part of or group within any caste, race or tribe. In discharge of the obligation imposed by Cl. (1) of Art. 341 the President issued the Constitution (Scheduled Castes) Order, 1950. In its original form, paragraph 3 declared that ".....no person who professes a religion different from Hindu would be deemed to be a member of a Scheduled Caste. There was a proviso to paragraph 3 which declared that every member, of the Ramdasi Kabirpanthi, Mazhabi or Sikligar caste resident in Punjab or the Patiala and East Punjab States Union would in relation to that State be deemed to be a member of the Scheduled Castes whether he professed the Hindu religion or the Sikh religion. Subsequently, Parliament enacted the Scheduled Castes and Scheduled Tribes Orders (Amendment) Act, 1956 which substituted for the original paragraph 3 the present paragraph, which declares :—

"3 Notwithstanding anything contained in paragraph 2, no person who professes a religion different from the Hindu or the Sikh religion shall be deemed to be a member of a Scheduled Caste."



It is apparent that for purposes of the Constitution the constitutional provisions relating to Scheduled Castes are intended to be applied to only those members of the castes enumerated in the Constitution (Scheduled Castes) Order, 1950 who profess the Hindu or the Sikh religion. Clearly, if it can be contemplated that a Christian belongs to one of those castes, he is barred by reason of paragraph 3, from being regarded as a member of a Scheduled Caste and is, therefore, not entitled to the benefit of the constitutional provisions relating to Scheduled Castes.

6. The main question debated us is whether a Hindu belonging to a Scheduled Caste retains his caste on conversion to Christianity. Cases decided by this Court and by the High Courts bearing on the point have cited on both sides of the line, and our attention has been invited to text books, Commentaries and Commission Reports, some of which contain the observation that depressed groups and castes are to be found not only among Hindus and Sikhs but also among Muslims and Christians. It appears to us unnecessary in this case to enter upon that question and to decide whether a Hindu belonging to the Adi Dravida caste continues to be a member of that caste on his conversion to the Christian religion. We shall assume, for the purposes of this case, that the caste is retained on conversion from one religion to the other. The real question is whether on the material before us it can be said that in confining the declaration to members of the Hindu and the Sikh reli-

gions, paragraph 3 of the Constitution (Scheduled Castes) Order, 1950 discriminates against members of the Christian religion.

7. Now it cannot be disputed that the caste system is a feature of the Hindu social structure. It is a social phenomenon peculiar to Hindu society. The provisions of the Hindu social order in reference at one time to professional and vocational occupation was moulded into a structural hierarchy which over centuries crystallised into a stratification where the place of the individual was determined by birth. Those who occupied the lower rung of the social ladder were treated as existing beyond the periphery of civilised society and were indeed not even "calculable." This social attitude committed those castes to severe social and economic disabilities and cultural and educational backwardness. And through much of Indian history the oppressive nature of the caste structure has denied to the disadvantaged castes the fundamental human dignity, human self-respect and even some of the attributes of the human personality. Both history and latter-day practice in Hindu society are heavy evidence of this oppressive tyranny, and despite the efforts of several noted social reformers, specially during the last few centuries, there has been a crying need for the emancipation of the depressed classes from the degrading condition of their social and economic servitude. J. H. Hutton, a Census Commissioner in India, framed a list of the depressed castes systematically, and that list was the basis of an order promulgated by the British Government in India called



ernment of India (Scheduled Castes) Order, 1936. The Constitution (Scheduled Castes) Order, 1950 is substantially based on the Order of 1936. The Order of 1936 enumerated several castes, tribes or tribes in an attached Schedule and they were, by paragraph 2 of the Order, deemed to be Scheduled Castes. Paragraph 3 of the same Order declared that the Indian Christians would not be deemed to be members of the Scheduled Castes. During the framing of the Constitution, the Constituent Assembly recognised "that the Scheduled Castes were a backward section of the Hindu community who were handicapped by the practice of untouchability", and that the evil practice of untouchability was recognised by any other religion and the question of any Scheduled Caste belonging to a religion other than Hindu did not therefore arise." B. Shiva Rao: the Framing of India's Constitution: The sikhs however, demand that some of their backward sections, the Mazhabis, Ramdasias, Birpanthis and Sikligars, should be included in the list of Scheduled Castes. The demand was accepted on the basis that these sects were originally Scheduled Caste Hindus who had only recently converted to Sikh faith and "had the same disabilities as the Hindu Scheduled Castes". The depressed classes within the fold of Hindu Society and the four classes of the Sikh community were therefore made the subject of the original Constitution (Scheduled Castes) Order, 1950. Subsequently in 1956 the Constitution (Scheduled Castes)

Order, 1950 was amended and it was broadened to include all Sikh untouchables.

8. It is quite evident that the President had before him all this material indicating that the depressed classes of the Hindu and the Sikh communities suffered from economic and social disabilities and cultural and educational backwardness so gross in character and degree that the members of those castes in the two communities called for the protection of the Constitutional provisions relating to the Scheduled Castes. It was evident that in order to provide for their amelioration and advancement it was necessary to conceive of intervention by the State through its legislative powers. It must be remembered that the declaration incorporated in paragraph 3 deeming them to be members of the Scheduled Castes was a declaration made for the purposes of the Constitution. It was a declaration enjoined by clause (1) of Article 341 of the Constitution. To establish that paragraph 3 of the Constitution (Scheduled Castes) Order, 1950, discriminates against Christian members of the enumerated castes it must be shown that they suffer from a comparable depth of social and economic disabilities and cultural and educational backwardness and similar levels of degradation within the Christian community necessitating intervention by the State under the provisions of the Constitution. It is not sufficient to show that the same case continues after conversion. It is necessary to establish further that the disabilities and handicaps suffered from



such Caste membership in the social order of its origin—Hindusim - continue in their oppressive severity in the new environment of a different religious community. References have been made in the material before us in the most cursory manner to the character and incidents of the castes within the Christian fold, but no authoritative and detailed study dealing with the present conditions of Christian society have been placed on the record in this case. It is therefore, not possible to say that the president acted arbitrarily in the exercise of his judgement in enacting paragraph 3 of the Constitution (Scheduled Castes) order, 1950. It is now well established that when a violation of Article 14 or any of its related provisions is alleged, the burden rests on the petitioner to establish by clear and cogent evidence that the State has been guilty of arbitrary discrimination. Having regard to the State of the record before us, we are unable to hold that the petitioner has established his

case. The challenge must, therefore, fail.

9. In the connected writ petition No. 1017 of 1984 the submissions proceeded substantially on the same grounds, and relief has been sought additionally against a Circular Letter No. 21711/ADWII/80-26 dated August 1, 1983 issued by the Government of Tamil Nadu to the Tamil Nadu public Service Commission stating that "scheduled Caste" Christians who revert to Hinduism and on that basis obtain appointments to reserved seats in Government services, and having done so change their religion once again after their entry into Government service are liable to have their selection cancelled. On the considerations which have prevailed with us in dismissing the earlier writ petition, this writ petition must also be dismissed.

10. The writ petitions are dismissed but without any order as to costs.

Petitions dismissed.



## OBSERVATION

**Probationer—Termination of his service prior to expiry of extended probationary period—Non-payment of notice salary before termination—No validity Constitution of India, Arts 309, 311 (2)—Central Civil Services (Temporary Service) Rules (1965), R. 5 (1) (b) proviso (as amended in 1971).**

## OBSERVED BY

Mr. A. P. Sen and Mr. V. Khalid  
Hon'ble Judges, Supreme Court of India

## IN

Civil Appeal No. 1213 of 1982 decided on 23-1-1986 in the case of Union of India and others, Appellants v. Arun Kumar Roy, Respondent.

## TEXT

V. Khalid, J:—This appeal by Special Leave is directed against the Judgement rendered by a Division Bench of Calcutta High Court on 7-12-1981, setting aside, in appeal, the Judgement pronounced by a single Judge. The Union of India and its Officers are the appellants. The facts in brief, necessary to understand the dispute involved in the case are as follows:—

The respondent joined the post of Stores Officer in the Department of Zoological Survey of India on July 30, 1977. He was placed on probation for two years. Before the expiry of the period of probation of two years he received a Memo dt. July 25, 1977, from the Senior Administrative Officer, Zoological Survey of India, informing him that the Government had decided to extend his period of probation as Stores

Officer by one year more from July 30, 1977. On July 27, 1978, the Dy. Secretary of the Government of India communicated to him an Order of the President of India by which he was informed that the President had terminated his service as a Stores Officer with effect from the afternoon of 29th July, 1978. This communication further stated that the respondent would be entitled to claim a sum equal to the amount of his pay plus allowances in lieu of one month's notice at the same rates at which he was drawing them immediately before the termination of his service. The respondent challenged this Order by filing Writ Petition No. 385 of 1981, before the Calcutta High Court. The main contention raised by him in the Writ Petition was that the Order of termination was bad since a sum equivalent to his pay plus allowances for the



notice period was not paid to him along with the notice as required under the terms of his appointment letter. The learned single Judge who heard the Writ Petition declined relief to the respondent and dismissed the Writ Petition. Aggrieved by the said Judgement the respondent filed an appeal. The Division Bench agreed with the respondent's case that the termination order was bad in as much as the full amount of salary and allowances for the notice period was not paid to him at the time of termination of his service and so holding set aside the Judgement of the single Judge and allowed the appeal and quashed the Order of termination and gave liberty to the Government to terminate his service in accordance with the terms of his appointment. Hence the appeal.

2. The main question debated at the Bar by the respective counsel is whether in the case of the respondent it was incumbent upon the Authorities to pay notice salary along with the termination notice or whether it was sufficient if he was informed that he was entitled to such salary on his termination. A resolution of this dispute depends upon consideration of the nature and terms of his appointment. To appreciate this, it is necessary to look into the order of appointment and relevant points of law governing the terms of service.

3. The respondent strongly pleaded that he was appointed to a substantive post since he was placed on probation. If his appointment was purely temporary it was not necessary to place him on probation. The case of the appe-

llant on the other hand was that the Order of appointment itself indicated that the respondent was appointed on a temporary hand and that he did not become a regular hand simply because he was put on probation. The termination in this case took place before the expiry of the extended period of probation which the authority concerned was entitled to do under the relevant rule.

4. We may, in passing, inquire as to what was the case of the respondent before the High Court. According to him after he took charge of the post of Stores Officer in the Department of Zoological Survey of India he discovered certain irregularities in the Stores, specifically in the item of rectified. According to him he brought such irregularities to the notice of his superior officer. He incurred, as consequence, the displeasure of the officer senior to him which resulted in the Order of termination of his service during the period of probation. Even so we would like to make it clear that neither before the learned single Judge nor before the Division Bench did the petitioner plead a case of mala fides. Nor did he do so before us.

5. The respondent appeared as a person before us. We find from the records that he argued his case before the High Court also. We felt sympathetic towards him and therefore suggested to the appellants' counsel to tell the appellants to accommodate him in the place lest, he, a young man, should spend his life without any employment. The Counsel for the appellants



at give us any assurance but undertook to convey our suggestions to the authorities concerned.

6. Now, coming to the merits of the case the Order of appointment of the respondent is produced as Annexure A. This shows that he was appointed on a temporary basis. It is made clear there that though the post is temporary, it is likely to continue indefinitely, that the appointment will be liable to be terminated at any time on one month's notice given by either side, thus he will be on probation for a period of two years which may be extended, if necessary, and that the other conditions of service will be governed by the orders and rules in force from time to time. Clause 2 (ii) of the Order of appointment is important. It reads :

“The appointing authority, however, reserves the right of terminating services of the appointee forthwith or before the expiry of stipulated period of notice by making payment to him of a sum equivalent to the pay and allowances for the period of notice or the unexpired portion thereof.”

7. The Order of termination dated 9th July, 1978, which is produced as Annexure B reads as follows :

“In pursuance of the provisions contained in para 2 (ii) and (iii) of this Department's C. M. No. F. 1-19/73-Sur. dt. the 9th July, 1975 regarding appointment to the post of Stores Officer in the Zoological Survey of India, the President of India hereby terminates with effect from the afternoon of 29th July,

1978, before the expiry of extended period of probation the services of Shri Arun Kumar Roy, Stores Officer, Zoological Survey of India, Calcutta and directs that he shall be entitled to claim a sum equivalent to the amount of his pay plus allowances in lieu of one month of notice at the same rates at which he was drawing them immediately before the termination of his service. By Order and in the name of the President.”

8. The learned single Judge who heard the Writ Petition, held that the respondent was a temporary Government servant and that he was governed by Rule 5(1) of the Central Civil Service (Temporary Service) Rules, 1965, Rule 5 (1) (b) as amended, provided in its proviso that on termination of a temporary Government Servant, one month's notice has to be given and that he shall be entitled to claim a sum equivalent to the pay and allowances for the period of his notice at the same rate at which he was drawing them immediately. The learned single Judge held that the order of termination was valid. The Division Bench disagreeing with the learned single Judge held that the Order of termination was bad since one month's salary and allowances was not paid or tendered to the appellant along with the notice. This is the only question that falls to be decided in this appeal.

9. It is not disputed that the salary and allowances for one month in lieu of notice was not paid tendered to the appellant simultaneously with the termination of his service. What is the legal consequence? To answer this question



it is necessary to refer to R.5 (1)(b) of the Central Civil Service (Temporary Service) Rules, 1965. Rule 5 (1) in its amended form reads as follows:

“5 (1) (a). The services of a temporary Govt. servant who is not in quasi-permanent service shall be liable to termination at any time by a notice in writing given either by the Government servant to the appointing authority or by the appointing authority to the Government servant;

(b) The period of such notice shall be one month, provided that the services of any such Govt. servant may be terminated forthwith and on such termination, the Govt. servant shall be entitled to claim a sum equivalent to the amount of his pay plus allowances for the period of the notice at the same rates at which he was drawing them immediately before the termination of his services, or as the case may be, for the period by which such notice falls short of one month.”

10. The proviso to R. 5 (1) (b), before it was amended, provided for the simultaneous payment of pay and allowances along with the order of termination. The amendment of the proviso to R. 5 (1) (b) was made in 1971 with retrospective effect from May 1, 1965. It is necessary to note that the appellant was appointed to the post of Stores Officer on July 30, 1975, that is after the amended rules came into force.

11. The learned single Judge relied Upon the amended proviso to R. 5 (1) (b) of the Rules and held that though

the pay and allowances were not paid or tendered simultaneously with the service of the order of termination, the same did not vitiate the termination of the appellant's service. It was a finding that was successfully challenged before the Division Bench by the respondent.

12. The Division Bench addressed itself to the question whether the amended provisions of the proviso to R. 5 (1) (b) applied to the case of the respondent or not. In coming to the conclusion that the order of termination was bad, the Division Bench relied upon the terms contained in the order of appointment and the Notification dt. 26-1-1967 which clarified the operation of R. 5 of the Rules. The Notification reads as follows :

“Under R. 5 of the Central Civil Services (Temporary Service) Rules, 1965, the services of a temporary Government servant, who is not a quasi-permanent service, can be terminated at any time by a notice in writing given either by the Government servant who is not in quasi permanent service to the appointing authority or the appointing authority to the Government Servant. A question has arisen whether this rule should be invoked also in the case of persons appointed on probation, when in the appointment letter specific condition regarding termination of service without any notice during or at the end of period of probation (including extended period, if any) has been provided. The position is that the CCS (TS) Rules do not



**V. Khalid**  
**Judge**  
**Supreme Court of India**

specifically exclude probationers or person on probation as such. However, view of the specific condition regarding termination of service without any break during or at the end of the period of probation (including extended period, if any), it has been decided in consultation with the Ministry of Law, that in cases where such a provision has been specifically made in the letter of appointment it would be desirable to terminate the service of the probationer person on the basis of the letter of appointment and not under R. 5 (1) of the Central Civil Services (Temporary Service) Rules, 1965."

13. The Division Bench relied upon the Notification and held that the said Notification excluded the operation of R. 5 (1) including the proviso thereto in the case of the petitioner whose service was terminated during the period of probation. The Division Bench did not agree with the contention of the Union of India that the Notification did not apply to the case of the appellant. Since on its view the terms of appointment clearly indicated that his services could be terminated only if the salary and allowances for one month were either paid or tendered along with the order of termination.

14. We find that the approach adopted by the Division Bench is not correct. We could first dispose of the contention raised by the respondent that he was not a temporary hand. The order of appointment itself makes it clear that he will be on probation for

a period of two years which may be extended, if necessary. According to him, a temporary hand is not normally put on probation nor is probation extended in the case of temporary hands. The fact that he was originally put on probation for a period of two years which was extended by one year itself indicates according to him that he is not a temporary hand. This contention need not detain us for long. The appointment order makes it clear that the appointment will be on a temporary basis. The mere fact that he was put on probation does not ipso facto make the appointment any the less temporary and for that reason his extended probation also. Unless the respondent makes out a case based on some rule which requires confirmation to a post on the expiry of the period of probation, he cannot succeed on the mere ground of his being put on probation for a period of two years or by the fact that his probation was extended. He cannot rely upon the first clause in the order of appointment either which states that though the post is temporary it is likely to continue indefinitely. In any case, the order of termination was served on him before the expiry of the extended period of probation. As already indicated R. 5 (1) (b) of the Rules was amended in 1971 with retrospective effect from May 1, 1965. The respondent was appointed on July 30, 1975. The amended rule, therefore, applied in his case. As per this Rule the payment of notice salary was not a



pre-requisite for termination. The payment can be made after the order of termination is served on the employee. Reliance by the High Court on the Notification in preference to the rules is also misplaced. Even if strict adherence to the notification is to be made, it has to be noted that it only states that "it would be desirable to terminate the services of probationer.....". That is, this notification does not make it obligatory for tender or payment of salary along with the order of termination.

15. A notification has no statutory force. It cannot override rules statutorily made governing the conditions of service of the employees. The notification is dt. 26-3-1967. Rule 5 (1) (b) was amended in 1971 with retrospective effect from May 1, 1965. The rule has necessarily to govern the service conditions and not the notification.

16. The effect of R. 5 of the Rules fell to be considered by this Court in two decisions, viz. Senior Superintendent, R.M.S. v. K.V. Gopinath, (1972) 3 SCR 530: (AIR 1972 SC 1487) and Raj Kumar v. Union of India, (1975) 3 SCR 963. The respondent relied strongly upon the following observations reported in (1972) 3 SCR 530.

".....The proviso to sub-rule (b) however gives the Government an additional right in that it gives an option to the Government not to retain the services of the employee till the expiry of the period of the notice : if it so chooses to terminate the service at any time it

can do so forthwith 'by payment to of a sum equivalent to the amount of his pay plus allowances for the period of the notice at the same rate at which he was drawing them immediately before the termination of his service, or as the case may be, for the period by which the notice falls short of one month.' In the risk of repetition, we may note the operative words of the proviso "the services of any such Government servant may be terminated forthwith by payment "To put the matter in a nutshell, to be effective the termination of service has to be simultaneous with payment to the employee of whatever is due to him. We need not pause to consider the question as to what would be the effect if there was a bona fide mistake as to the amount which is to be paid. The rule does not lend itself to an interpretation that the termination of service becomes effective as soon as an order is served on the Government servant irrespective of the question as to when the payment due to him is to be made. If that was the intention of the framers of the rule, the proviso would have been differently worded. As has often been said that if "the precise words used are plain and unambiguous, we are bound to construe them in their ordinary sense" 'and not to limit plain words by the Act of Parliament by consideration of public policy, if it be policy, as to which may differ and as to which decisions may vary."

This decision was rendered on 18, 1972. It was the validity of an order dated Sept. 25, 1968, termin



**V. Khalid**  
**Judge**  
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respondent therein, that was in question in that case. We would like to observe, with respect, that the amendment brought into R. 5 (1) (b), with effect from May 1, 1965, escaped the notice of the Bench that decided that case. The error was subsequently corrected by another Bench of this Court in the decision in *Rajkumar v. Union of India*, (AIR 1975 SC 1116) by stating:

“.....The effect of this amendment that on 1st May, 1965, as also on 15-6-71, the date at which the appellant's services were terminated forthwith it was not obligatory to pay to him a sum equivalent to the amount of his pay and allowances for the period of the notice at the rate at which he was drawing them immediately before the terminating of his services or as the case may be for the period by which such notice falls short. The Government servant concerned was only entitled to claim the sums herebefore mentioned. Its effect is that the decision of this Court in *Gopinath's case* [AIR 1972 SC (1487) (supra)] is no longer good law. There is no doubt that this rule is a valid rule because it is now well established that rules made under the proviso to Article 309 of the Constitution are legislative in character retrospectively.”

17. The question whether the terms embodied in the Order of appointment should govern the service conditions of employees in Government service or the rules governing them is not an open question now. It is now well

settled that a Government servant whose appointment though originates in a contract, acquires a status and thereafter is governed by his service rules and not by the terms of contract. The powers of the Government under Art 309 to make rules, to regulate the service conditions of its employees are very wide and unfettered. These powers can be exercised unilaterally without the consent of the employees concerned. It will, therefore, be idle to contend that in the case of employees under the Government, the terms of the contract of appointment should prevail over the rules governing their service conditions. The origin of Government service often times is contractual. There is always an offer and acceptance, thus bringing it to being a completed Contract between the Government and its employees. Once appointed, a Government servant acquires a status and thereafter his position is not one governed by the contract of appointment. Public law governing service conditions steps in to regulate the relationship between the employer and employee. His emoluments and other service conditions are thereafter regulated by the appropriate statutory authority empowered to do so. Such regulation is permissible in law unilaterally without reciprocal consent. This Court made this clear in two Judgments rendered by two Constitution Benches for this Court in *Roshan Lal Tandon v. Union of India*, (1968). 1 SCR 185 and in *State of Jammu and Kashmir v. Triloki Nath Khalsa*, (1974) 1 SCR 771. 18. Thus it is clear and not open to doubt



that the terms and conditions of the service of an employee under the Government who enters service on a contract will, once he is appointed, be governed by the rules governing his service condition. It will not be permissible thereafter for him to rely upon the terms of contract which are not in consonance with the rules governing the service.

19. The powers of the Government under Art 309 of the Constitution to make rules regulating the service conditions of the government employees cannot, in any manner, be fettered by any agreement. The respondent cannot, therefore, succeed either on the terms of the contract or on the notification which the High Court has relied upon. Nor can he press into service the rule of estoppel against the Government.

20. Now, we may usefully advert to cl. (v) of para to of the Orders of appointment. This clause reads as follows:

"Other conditions of service will be governed by the relevant rules and orders in force from time to time.

21. This clause was inserted by way of abundant caution making it clear that the conditions of service will be regulated by the rules, obtaining

from time to time regarding the service in question.

22. The Division Bench of the High Court, in our considered view, considered in relying upon the notification in preference to R. 5 (1) (b) and to hold that the Order of termination was wrong and in setting aside the Judgement of the learned single Judge. The Judgement under appeal has, therefore, to be set aside and we do so. The appeal is allowed with no order as to costs.

23. We repeat what we have stated above. The respondent has been sent out for reasons which we cannot decide in the absence of necessary materials. We suggested to the learned Counsel for the appellants. Mr. Tyagarajan, to provide the respondent with some job. The Counsel, in fairness, agreed to consult his clients. Though our Judgement was ready long ago, we gave time to the appellants' Counsel here on three occasions, to explore the possibility of providing some job to the respondent. Nothing tangible has happened. We still hope that this young man will be provided with some job the department.

Appeal allowed



port No. 23, p. 01

**S. Natarajan**

**Judge**

**Supreme Court of India**

### OBSERVATION

**Expunction of derogatory remarks against witness—Remarks made by High Court while deciding appeal against conviction—For deciding appeal criminal evaluation of evidence of witness not necessary—Remarks are unjustified and need to be expunged. (Prevention of Corruption Act (2 of 1947), Ss. 5, (Penal Code (45 of 1860), S. 160)—Constitution of India, Art. 136,**

### OBSERVED BY

**Mr. V. Balakrishna Eradi and Mr. S. Natarajan**  
**Hon'ble Judges, Supreme Court of India**

### IN

**Criminal Appeal No. 421 of 1985, decided on 11-4-1986 in the case of Niranjana Patnaik, Appellant v. Sashibhusan Kar and another, Respondents.**

### TEXT

S. Natarajan, J. :— A peculiar feature of this appeal by special leave is that it is not an appeal against conviction or against acquittal but one preferred by the prosecution witness for expunction of several highly derogatory remarks made against him by a learned Judge of the High Court of Orissa while allowing Criminal Appeal No. 31 of 1982 on the file of the High Court of Orissa. Sri Niranjana Patnaik, the appellant before us was examined as P. W. 8 in the trial of T. R. Case No. 6 of 1980 in the file of the Special Judge (Vigilance), Sambalpur against the first respondent. The trial ended in conviction against the first respondent and when the appeal filed by him came to be heard by the High Court the appellant had become a Cabinet Minister in the State of Orissa. On account of the disparaging remarks made by the Appellant

Judge the appellant tendered his resignation and demitted office for maintaining democratic traditions. It is in that background this appeal has come to be preferred.

2. Pursuant to a trap laid by the Vigilance Police on the complaint of the appellant's Manager, Gopi Nath Mohanty (P. W. 2) the first respondent was arrested on 26-4-79 for having accepted a bribe of Rs. 2,000/- from Gopi Nath Mohanty. The marked currency notes M. Os. V. to XXVI were recovered from the brief case M. O. II of the first respondent prior to the arrest. The prosecution case was that the first respondent had been extracting illegal gratification at the rate of Rs. 1,000/- per month during the months of January February and March, 1979 from Gopi Nath Mohanty but all of a sudden he raised the demand to Rs.



2,000/- per month in April 1979 and this led to Gopi Nath Mohanty laying information (Exhibit I) before the Superintendent of Police (Vigilance) Acting on the report, a trap was laid on 26-4-79 and after Gopi Nath Mohanty had handed over the marked currency notes the Vigilance party entered the office and recovered the currency notes from the brief case and arrested the first respondent. The first respondent denied having received any illegal gratification but offered no explanation for the presence of the currency notes in his brief case.

3. Eleven witnesses including the appellant who figured as P. W. 8 were examined by the prosecution and the first respondent examined three witnesses D. Ws. 1 to 3 to substantiate the defence set up by him, viz, that the sum of Rs. 2,000/- had been paid by way of donation for conducting a drama and publishing a souvenir by the Mining Officers' Club and also towards donation for Children's Welfare Fund. The Special Judge accepted the prosecution case and held the first respondent guilty under S. 5 (2) read with S. 5 (1) (d) of the Prevention of Corruption Act, 1947 (hereinafter referred to as the 'Act') and S. 161 of the Indian Penal Code (hereinafter referred to as the 'Code'). The Special Judge awarded a sentence of rigorous imprisonment for one year for the conviction under the first charge but did not award any separate sentence for the conviction under S. 161 of the Code.

4. Against the conviction and sen-

tence the first respondent preferred Criminal Appeal No. 31 of 1982 to the High Court of Orissa. A learned Judge of the High Court has allowed the appeal holding that the prosecution has not proved its case by acceptable evidence and besides, the first respondent's explanation for the possession of the currency notes appeared probable. While acquitting the first respondent the learned Judge has however, made several adverse remarks about the conduct of the appellant and about the credibility of his testimony and it is with that part of the judgment we are now concerned with in this appeal.

5. Mr. F. S. Nariman, learned counsel for the appellant argued that the appellant's limited role in the case has been unnecessarily and unjustly magnified by the Appellate Judge and further more the legal presumptions against the first respondent have been failed to be applied and these errors have led the learned Judge to make uncalled for caustic comments against the appellant. Mr. Nariman further argued that it was not at all necessary for the learned Judge to have dwelt at length on the value of the testimony of the appellant for allowing the appeal of the first respondent. Mr. Parasaram learned Attorney General participated in the debate pursuant to the notice issued to him and rendered assistance by placing before us certain earlier decisions laying down the principles to be followed if adverse comments are to be made by Court affecting the character and reputation of litigants witness and



rd parties. Mr. Jitender Sharma, turned counsel for the first respondent did not advance any arguments as no disturbance of the acquittal of the first respondent by the Appellate Judge is sought for in the appeal.

6. Having regard to the limited scope of the appeal it is not necessary for us to traverse at length or refer in detail the circumstances under which the trap was laid and the first respondent was arrested. Suffice it to say that Shri Niranjana Patnaik, the appellant was the licensee of an Iron Mine known as Murgabada Mines at Joda. Gopi Nath Mohanty (P. W. 2) had been employed by him as Manager of the mines and he was attending to the affairs of the Mines. The first respondent who was the Senior Mining Officer for Joda had insisted on payment of Rs. 1,000 to him for allowing mining operations to be carried on peacefully and Gopi Nath Mohanty had complied with the demand paid Rs. 1000/- every month during January to March, 1979. Unexpectedly when the first respondent raised the demand to Rs. 2,000/- per month Gopi Nath Mohanty reported the matter to the Superintendent of Police (Vigilance) and on his instructions a trap was laid on 26-4-1979 and marked currency notes M. Os. V. to YXVI were passed to the first respondent and thereafter the raiding party consisting of the Inspector of Police, Vigilance (P. W. 10) and an Executive Magistrate (P. W. 9) recovered the money from the first

respondent and arrested him. The first respondent was subjected to a chemical test of having his hands washed with sodium carbide solution. The solution turned pink in colour establishing his having handled the marked currency notes treated earlier with phenolphthalein powder.

7. The appellant was cited as a prosecution witness to speak to the fact that his Manager, Gopi Nath Mohanty (P. W. 2) had informed him in March 1979 of his having parted with a sum of Rs. 3,000/- to the first respondent by way of bribe during the first three months of 1979 and subsequently about the trap that had been laid for the first respondent. The appellant was not therefore, a material witness in the case and had only been cited to corroborate the testimony of Gopi Nath Mohanty in some measure. As he was not a material or crucial witness the appellant did not evince any interest in the trial of the case. He, therefore, failed to appear in Court in spite of being summoned to attend the Court on 3-2-1981 and again on 6-3-1981. His disregard of the summons from Court led to a third summons being issued on 17-8-1981 with a warning that if he failed to appear in Court on 7-9-1981 he would be compelled to attend Court by means of a warrant. It was on such compulsion the appellant appeared in Court on 7-9-81 and gave his testimony. These facts are not controverted by anyone but even so the appellant has filed an affidavit before this Court to substantiate these matters.



8. As earlier stated the first respondent did not deny his receiving the currency notes from Gopi Nath Mohanty or the recovery of the notes from his brief case M. O. 11. He, however, stated that the Money was given by way of donation for the welfare projects launched by the Mining Officer's Club of the three defence witness examined by him D.Ws. 1 and 3 were Mines Inspectors while D. W. 2 was a peon attached to the office of the first respondent. D. Ws. 1 and 3 had, however, to admit that the records produced to substantiate the case of donation had been prepared after the first respondent had been arrested and released on bail and the writing were made to the dictation of the first respondent.

9. The trial Judge while assessing the merits of the prosecution case took note of the fact that since the first respondent did not deny the receipt of the money or the seizure of the currency notes from him the burden of proof shifted to him under S. 4 (1) of the Act. The Special Judge was of the view that the explanation of the first respondent was belated and, therefore, was not believable or acceptable and hence he convicted and sentenced him.

10. The learned Appellate Judge, while dealing with the appeal has failed to take note of S. 8 of the Act and secondly he has given recognition to the rule of presumption contained in S. 4 (1) of the Act only at a belated stage of the judgement. These factors have to a large extent distorted the perspective to be taken in the case. Section 8

of the Act which is extracted below confers immunity from prosecution under S. 165A on persons who figure as witnesses in any proceeding against a public servant for an offence under S. 161 or S. 165 or under S. 5 (2) or S. 5 (3A) of the Act.

“Notwithstanding anything contained in any law for the time being in force, a statement made by a person in any proceeding against a public servant for an offence under S. 161 or S. 165 of the Indian Penal Code, or under sub-sec. (2) or sub-sec. (3A) of S. 5 of this Act, that he offered or agreed to offer any gratification (other than legal remuneration) or any valuable thing to the public servant, shall not subject such person to a prosecution under S. 165A of the said Code.”

11. Oversight of this provision has made the Appellate Judge conclude that the appellant and Gopi Nath Mohanty (P. W. 2) are as much guilty as the first respondent in the commission of the offences and as such they stand self-condemned as accomplices to the crime and furthermore the two of them stood exposed to prosecution under S. 165A of the Code.

12. In so far as the rule of presumption under S. 4 (1) is concerned the learned Judge has no doubt recognised in the later portion of the judgement that even though S. 4 (1) would not apply to the charge under S. 5 (2) read with S. 5 (1) of the Act it would undoubtedly stand attracted to the charge under S. 161 of the Code. If the learned Judge



and visualized this position at the outset itself there would not have been any necessity for a microscopic examination of the evidence of the appellant for making sweeping remarks against him. Mr. Nariman is, therefore, justified to some extent in contending that even though the Appellate Judge was aware that for the charge under 161 of the Code the first respondent was under an obligation to rebut the legal presumption raised against him the learned Judge has recognised this position only after devoting the earlier portion of the judgement for decrying the appellant Gopi Nath Mohanty for having willingly played the role of bribe-givers.

13. Yet another serious infirmity in the judgement of the Appellate Judge is that the learned Judge has castigated the appellant and Gopi Nath Mohanty for having given bribes of Rs. 1,000/- per month for three months to the first respondent and decried both of them for putting forth a false case while at the same time holding that the receipt of bribe of three thousand rupees is not the subject-matter of charge and as such the first respondent was under no obligation to disprove the evidence of the appellant and Gopi Nath Mohanty on that aspect of the matter. Since the payment of Rs. 1,000/- during the earlier months was not the subject-matter of charge there was no need or necessity for the learned Judge to have critically examined the evidence of the appellant and Gopi Nath Mohanty on that aspect of the

matter. Conversely if the learned Judge felt that the evidence relating to those payments had a material bearing on the case he should not have absolved the first respondent of any obligation to deny those allegations. The error that has crept in because of the different standards adopted can be seen from the conflicting expressions in the judgment extracted as under :

In para 12 of the judgment it is stated as below :—

“The statements made by Mr. Patnaik (P.W.8) and his manager (P.W.2) with regard to willing participation in the matter of payments of bribe money to the appellant would bring about their own condemnation. These two persons, on their own showing, were bribe givers. A bribe-giver must be condemned as much as a bribe-taker. Givers of bribe amounts to public servants are undoubtedly accomplices to the crime..... Being accomplices to the commission of crime because of their statements of payments of bribe money to the appellant for three months, the evidence of these selfcondemned persons, who on their own showing had thrown moral scruples and sense of honesty, if they had any to the winds for which instead of refusing to meet the demand of the appellant, they had willingly paid bribe amounts for three months, would be unworthy of credit without corroboration in material particulars and through reliable sources.”

14. However, in para 16 of the judgement it is held that the first respon-



dent was under no obligation to meet the allegations relating to the payment of Rs. 3,000/- to him. The relevant portion is worded as follows :

“He had neither been charged under Ss. 5 (2) and 5 (1) (d) of the Act or under S. 161 of the Code for receiving illegal gratification during the months of January to March, 1979 and had not been asked to meet these allegations. No person can be condemned unheard and for that reason the appellant could not be condemned on the basis of the statement made by P. W. 2 and P. W. 8 that he had been paid bribe amount for 3 months at the rate of Rs. 1,000/- per month.”

15. Nevertheless the learned Judge has again reverted to his original perspective and commented in para 17 as under :

“If as submitted by the defence, the evidence of P. Ws. 2 and 8 with regard to the monthly payment of bribe money at the rate of Rs. 1,000/- per month and the increased demand of Rs. 2,000/- is not accepted for the aforesaid reasons, it would expose the utter falsity of the evidence of P. Ws. 2 and 8”.

16. Over and above all these, the learned Judge has failed to consider whether a detailed examination of the testimony of the appellant was really called for in order to allow the appeal of the first respondent and set aside his convictions from what has already been stated it will be apparent that what fell for consideration was whether a sum of Rs. 2,000/- which was admittedly recovered from the first respondent had been

received by him by way of bribe or way of donation. For this limited question the appellant was not a material witness in the case. It was only Manager, Gopi Nath Mohanty (P. W. 2) who claimed to have made the early payments to the first respondent as well as to have given report and participated in the trap proceedings when the first respondent raised the demand of bribe from Rs. 1,000 to Rs. 2,000 per month. The assumption of the Appellate Judge that Gopi Nath Mohanty would not have paid any sum of money to the first respondent or given the FIR (Exhibit P) against him without securing the prior approval of the appellant is only based on conjecture and not on evidence. The learned Judge has also overlooked the fact that the appellant had not exhibited any anxiety to depose against the first respondent and on the other hand he appeared in Court and gave evidence only after being warned in the summons issued for the third time that a warrant would be issued against him if he failed to respond to the summons. If all these factors had been perceived it would have been clear that there was no need whatever for a minute examination of the appellant's testimony or a critical inquiry into the position of his character and conduct and the judgement of acquittal could have as well been rendered with reference to the failings in the evidence of Gopi Nath Mohanty and the acceptable features in the explanation of the first respondent for his possession of the currency notes of M. Os. V. to XXVI series.

17. The defective approach made



the Appellate Court has resulted in paragraphs 9 to 17 being devoted to an evaluation and criticism of the appellate evidence out of the total 36 paragraphs contained in the judgement. In these paragraphs the Appellate Judge has severely criticised the appellant and has made harsh remarks which are not sought to be expunged. They are extracted below :

"These two persons, on their own avowal, were bribe-givers.....Being accomplices to the commission of crime because of their statements of payments of moneys to the appellant for three months, the evidence of these two self-condemned persons, who, on their own avowal, had thrown moral scruples and sense of honesty, if they had any, to the winds for which instead of refusing to meet the demand of the appellant, they had willingly paid bribe-amounts for three months, would be unworthy of credit without corroboration in material particulars and though reliable sources."

"..... in which case both P. Ws. 2 and 8 would be liable for abetment of commission of the said offence by the appellant.....The acts of P. Ws. 2 and 8 would also be culpable under S. 165-A of the Code.....both P. Ws. 2 and 8 were liable to be punished under S. 165-A of the Code. The investigating agency did not choose to prosecute the appellant and P. Ws. 2 and 8 for commission of these offences."

"Undoubtedly, P. Ws. 2 and 8 belong to the first category."

"..... these two accomplices, nam-

ely..... ."

"While, as observed by me, P. Ws. 2 and 8 and have condemned themselves as habitual bribe-givers by their own statements and for this, they have to blame none but themselves.

18. It will be apposite to mention here that the appellant has now here stated in his evidence that Gopi Nath Mohanty made the payment of Rs. 3,000 for the three months in question after obtaining his permission or approval. On the other hand he has only deposed that in March 1979 Gopi Nath Mohanty had informed him of the payment of these amounts, and in order to balance the accounts he had given directions for the amount being shown as impressed cash with the Manager. The Appellate Judge has also proceeded on the assumption that the appellant was holding a public office at the relevant time while in fact the appellant had neither joined the Ministry nor even became a Member of the Legislative Assembly when the first respondent was trapped and arrested.

19. We may now refer to certain earlier decisions where the right of Courts to make free and fearless comments and observations on the one and the corresponding need for maintaining sobriety, moderation and restraint regarding the character, conduct integrity, credibility, etc of parties, witnesses and others are concerned.

20. In state of Uttar Pradesh v. Mohammad Naim, (1964) 2 SCR 363 it was held as follows :



"It there is one principle of cardinal importance in the administration of justice, it is this the proper freedom and independence of Judges and Magistrates must be maintained and they must be allowed to perform their functions freely and fearlessly and without undue interference by any body, even by this Court. At the same time it is equally necessary that in expressing their opinions Judges and Magistrates must be guided by considerations of justice, fair play and restraint. It is not infrequent that sweeping generalisations defeat the very purpose for which they are made. It has been judicially recognised that in the matter of making disparaging remarks against persons or authorities whose conduct comes into consideration before Courts of law in cases to be decided by them, it is relevant to consider (a) whether the party whose conduct is in question is before the Court or has an opportunity of explaining or defending himself; (b) whether there is evidence on record bearing on that conduct justifying the remarks; and (c) whether it is necessary for the decision of the case, as an integral part thereof, to animadvert on that conduct. It has also been recognised that judicial pronouncements must be judicial in nature, and should not normally depart from sobriety, moderation and reserve."

21. Vide also in *R. K. Lakshmanan Vs. A. K. Srinivasan*, (1975) 1 SCR 204 : (AIR 1975 SC 1741) wherein this ratio has been referred to.

22. In *Panchanan Benerji v. Upendra Nath Bhattacharji*, AIR 1927 all Sulaman, J. held as follows :

"The High Court, as the Supreme Court of revision, must be deemed to have power to see that Courts below do not unjustly and without any lawful excuse take away the character of a party or of a witness or of a counsel before it."

23. It is, therefore, settled law that harsh or disparaging remarks are not to be made against persons and authorities whose conduct comes into consideration before Courts of law unless it is really necessary for the decision of the case as an integral part thereof to animadvert on that conduct. We hold that the adverse remarks made against the appellant were neither justified nor called for.

24. Having regard to the limited controversy in the appeal to the High Court and the hearsay nature of evidence of the appellant it was not at all necessary for the Appellate Judge to have animadverted on the conduct of the appellant for the purpose of allowing the appeal of the first respondent. Even assuming that a serious evaluation of the evidence of the appellant was really called for in the appeal the remarks of the learned Appellate Judge should be in conformity with the settled practice of Courts of observe sobriety, moderation and reserve. We need only remind that the higher the forum and the greater the powers, the greater the need for restraint and the more mellowed the reproach should be.



No. 23, p. 09

**S. Natarajan**  
**Judge**  
**Supreme Court of India**

As we find merit in the conten-  
the appellant, for the afore-  
sons, we allow the appeal and  
the derogatory remarks made

against the appellant set out earlier to  
stand expunged from the judgement under  
appeal.

Appeal allowed

RECORDED IN THE COURT OF THE

JUDGE

ON 11/11/2011



**IT IS THE ESSENCE OF DEMOCRACY  
TO OBEY  
NO MASTER BUT THE LAW**



## OBSERVATION

**Age restriction in promotion—Appointment of Assistant Judges by promotion amongst members holding posts of Civil Judges—Provisions are irrational, arbitrary and unreasonable—Gujarat Judicial Service Recruitment Rules (1961) (as amended in 1979)—Constitution of India Art 14, 16, 309, 234,**

## OBSERVED BY

Mr. A. P. Sen, Mr. E.S. Venkataramiah and  
Mr. B. C. Ray  
Hon'ble Judges, Supreme Court of India.

## IN

Civil Appeal No. 2588 of 1985 decided on 19-3-1986 in the case of Indravadan Shah Appellant v. State of Gujarat and another, Respondents.

## TEXT

Ray, J. :—This appeal raises a very short though important question as to the validity and vires of the provisions of Rule 6(4) (i) and Rule 6(4) (iii) (a) of the Gujarat Judicial Service Recruitment (Amendment) Rules 1979. The relevant rules are quoted hereinbelow :

(i) Appointment to the post of an Assistant Judge shall be made by the Governor in consultation with the High Court by promotion of a person from amongst such persons (comprising of those holding the posts of Civil Judges (Junior Division) and those in the cadre of Civil Judges (Senior Division) whose name have been entered in the Select List referred to in the Clause (ii) before they have reached the age of 41 years and continue in that list on the date of appointment;

Provided that no person shall be

eligible for such appointment unless he has :

(a) served for a period of not less than seven years as a Civil Judge (Junior Division); or

(worked on civil side for a period of not less than three years if he belongs to the cadre of Civil Judge (Senior Division).

(ii) A Select List of members who are considered fit for appointment by promotion to posts of Assistant Judges shall be prepared annually by Government in consultation with the High Court. The selection shall be based on merit, but seniority of the member shall be taken into account as far as possible.

(iii) (a) The name of a candidate entered in the Select List shall be struck



out of it on his reaching the age 49 years if during the interval, he is not appointed as an Assistant Judge.

2. The appellant was born on 6-4-1934 and in accordance with the provisions of Gujarat Judicial Service Recruitment Rules 1961 as amended in 1964 to 1969, the appellant being in the cadre of Civil Judge (Senior Division) was considered for selection for inclusion in the select list to be considered for appointment by promotion to the post of Assistant Judge in the years 1980-81 and 1981-82, but he was not found suitable. He was, however, found suitable and his name appeared in the Selection List prepared for the year 1982-83. His turn did not come up and the Select List lapsed with the expiry of 30-4-1983. On that date as had already completed 48 years, his name was not put on the select List for the following year, namely 1983-84. It is against this non-appearance of his name in the Select List of 1983-84, the appellant assailed the validity of the aforesaid provisions of Rules 6 (4) (i) and 6 (4) (iii) (a) of the Gujarat Judicial Service Recruitment Rules, 1961 as amended up to 1979 on the ground that they were unreasonable, arbitrary, discriminatory and violative of Articles 14 and 16 of the Constitution of India by a Writ Petition in the High Court of Gujarat being Civil Appeal No. 2332 of 1984, whereon a rule was issued on December 17, 1984. The said rule after notice to the parties was discharged and it was held that the impugned rules were not arbitrary, unreasonable

or irrational and they are not also discriminatory.

3. The Governor of Gujarat framed the Gujarat Judicial Service Recruitment Rules 1961 under proviso to Article 309 of the Constitution of India read with Article 234 of the Constitution laying down the mode of recruitment to the Gujarat Judicial Service. These rules as amended up to 1979 provided that the Gujarat Judicial Service shall consist of two branches namely (i) Junior Branch and (ii) Senior Branch. The junior branch shall consist of two classes, i. e. (a) Class I comprising the cadre of Civil Judges (Senior Division) and (b) the Judges of the Court of Small Causes and (c) Class II comprising Civil Judges (Junior Division) and Judicial Magistrates of First Class. In accordance with the amended recruitment Rules 1979 the cadre of Civil Judges (Senior Division) shall consist of :—

(a) all Judicial Officers holding on the said date, the post of :

(i) Civil Judge (Senior Division)

(ii) Chief Judicial Magistrate

and

(iii) Metropolitan Magistrate

(b) Officers recruited to the said cadre under sub-rule (i) of Rule 4.

4. The Senior Branch shall consist of District Judges, Principal Judges of Ahmedabad City Civil Court the Chief Metropolitan Magistrate, the Chief Judge of Small Causes Court, Ahmedabad, the Additional Chief Metropolitan Magistrate, Ahmedabad and the Assistant Judges, Rules 6 (4) (i) and 6(4)



(a) clearly provide that a Civil Judge (Senior Division) after completing 48 years of age will not be eligible for consideration for promotion to the post of Assistant Judge and his name appearing in select list will be struck out from the select list on his completion of 48 years, on reaching 49 years of age.

5. The only question for consideration is whether the provisions of aforesaid Rules 6 (4) (i) and 6 (4) (iii) (a) of Gujarat Judicial Service Recruitment Rules 1961 as amended up to 1979 are valid being arbitrary, irrational, unreasonable and in contravention of the equality clause envisaged in Articles 14 and 16 of the Constitution of India. To decide properly this question, it is relevant to consider in this connection Rule 2 (i), which provides for appointment to the post of District Judge. The relevant except of the said rule is quoted hereinbelow :

The appointment to the post of a District Judge shall be made by the Governor :—

(a) in consultation with the High Court from amongst the members of the Junior Branch who have ordinarily served as Assistant Judges ; or

(d) on the recommendation of the High Court from amongst members of the Bar who have practised as Advocates or Pleaders for not less than seven years in the High Court or Court subordinate to it ;

Provided that a person recruited at the age of not more than 45 years (except the case of a person belonging to a

community recognised as Backward by Government for the purpose of recruitment in whose case at the age not more than 48 years) shall before he is appointed as a District Judge, be appointed in the first instance to be an Assistant Judge for such period as may, on the recommendation of the High Court, be decided by Government on the merits of his case.

6. It appears that regarding appointment to the posts of District Judges by promotion from amongst members of the Junior Branch who have ordinarily served as an Assistant Judge, there is no limit or bar of age unlike that of the appointment of an Assistant Judge by promotion from the members of Civil Judges (Senior Division) or from members of Civil Judges (Junior Division) or from members of Civil Judges (Junior Division). It is only in the case of direct recruitment from amongst the members of the Bar to the post of District Judges there is an age limit of 45 years which is relaxed to 48 years in the case of recruitment of persons belonging to the community recognised as backward by the Government. It was tried to be justified on behalf of the respondents particularly by the High Court of Gujarat by filing counter that this age restriction for promotion to the post of Assistant Judge was in vogue since 1924 or so even in the erstwhile State of Bombay, though there was no age limit for selection to the post of District Judge from the Bar. It has been further stated that the rationale underlying the age restriction for recruitment to the post of Assis-



tant Judge is that such Assistant Judges should have sufficient number of years left before they reach the age of superannuation, so that their service can be utilized as District Judges. There would be no point in selecting them as Assistant Judges if they have to retire only as Assistant Judges. It has been further stated therein that the present any scale of Civil Judges (Senior Division) is Rs. 1300-1700/- p. m. and the same is the scale for the post of an Assistant Judge. So if an incumbent is taken as an Assistant Judge at an advanced stage he may have to retire only as Assistant Judge with the result that he will not have any pecuniary gain by being promoted as an Assistant Judge from the post of Civil Judge (Senior Division). It has been further stated that the law making authority might have considered that a Civil Judge (Senior Division) or Civil Judge (Junior Division) who completes 48 years of age may not be fully equipped with the physical and mental calibre for that higher post calling for essentially different type of duties, namely conducting Sessions cases, appeals, etc. The High Court duly considered this aspect of the case and thereafter the rules in question were framed. No rejoinder has, however, been filed on behalf of the State.

7. Similar contentions were made before us by the learned counsel who appeared on behalf of the High Court to support the rationale behind the laying down of the age bar for the purpose of promotion to the post of Assistant Judge in case of persons already in service.

8. The Division Bench of Gujarat High Court held that this system was in vogue for many decades even in the bilingual State of Bombay. Though there was no restriction regarding age for selection from the members of the Bar to the post of District Judge, there was age limit for selection and appointment by promotion from the members of Junior Branch to the post of Assistant Judges. This age restriction provided by the recruiting authority for different cadres of posts is not repugnant to Article 14 of the Constitution. It was also observed that members of the Bar have got free atmosphere to work and there was enough scope for them to better develop their mental faculty. If in the interest of an important post like that of a District Judge a member of the Bar is to be recruited in order to enthuse fresh blood at this important position of the service cadre, it can be said to be a different class altogether. As such there was no discrimination by introducing age bar in the recruitment rules so far as appointment to the post of Assistant Judges by promotion is concerned. The Class of Assistant Judges and the Class of District Judges for this purpose constitute two different classes.

9. This reasoning given by the High Court is totally unsustainable for the simple reason that if a person holding the post of Civil Judge (Senior Division) who has completed 48 years of age is considered to be not fully equipped with the physical and mental calibre for being appointed to the higher post of



**B. C. Ray****Judge****Supreme Court of India**

Assistant Judge, then on the same analogy how a member of the Bar will be considered at the age of 48 years to be most suitable for being appointed to the higher and responsible post of District Judge and such appointees will infuse fresh blood at that important service. On the other hand it is well established that with the coming of age and experience, a judicial officer becomes more suited and well equipped to perform and discharge higher duties and responsibilities attached to the higher posts of Assistant Judge and that of District Judge.

10. The posts of Assistant Judge as well as of District Judge are included in the Senior Branch of Gujarat Judicial Service. It is incomprehensible how these two cadres of Assistant Judges and District Judges can be treated as two different classes altogether, thereby justifying the introduction of age restriction in regard to selection and appointment by promotion to the post of Assistant Judge while doing away with any such sort of age limit or restriction in respect of appointment to the post of a District Judge by promotion from amongst the members of the Junior Branch who have served as Assistant Judges. Articles 14 and 16 of the Constitution ensure that there should not be any discrimination in the matter of appointment in service, nor there will be any arbitrariness or unreasonableness in the rules of recruitment providing for appointment to the service either by promotion or by direct recruitment. There is no nexus to the object sought to be achieved by introducing the age

restriction as regards the promotion by appointment to the post of Assistant Judge from amongst the members of the Gujarat Judicial Service (Junior Branch), as provided in Rules 6(4) (i) and 6 (4) (iii) (a) of the said rules. But in respect of appointment to the higher post of a District Judge by promotion from amongst the members of the Junior Branch who have served as Assistant Judges, on such restriction of age has been provided in Rule 7 (2) (i) (a) and (b) of the said rules. There is obviously no rationale nor any reasonableness for introduction of this age bar in regard to appointment by promotion to the post of an Assistant Judge. That rule, is, therefore, arbitrary and it violates the salutary principles of equality and want of arbitrariness in the matter of public-employment as guaranteed by Articles 14 and 16 of the Constitution. It is pertinent to refer in this connection to the observation of this Court in the case of *E. P. Royappa v. State of Tamil Nadu* (1974) 2 SCR 348 which are in the following terms:—

“Though enacted as a distinct and independent fundamental right because of its great importance as a principle ensuring equality of opportunity in public employment which is so vital to the building up of the new classless society envisaged in the constitution, Art. 16 is only an instance of the application of the concept of equality enshrined in Art. 14. In other words Art. 14 is the genus while Art. 16 is a species, Art. 16 gives effect to the doctrine of equality in all matters relating to



public employment. The basic principle which, therefore, informs both Arts. 14 and 16 is equality and inhibition against discrimination.....

Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed, combined and confined" within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law....."

11. Similar observations have been made in the case of *Maneka Gandhi v. Union of India* (1978) 2 SCR. 621. It has been observed that :—

"Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence".

12. The reach and ambit of Article 14 has been very succinctly reiterated again by this Court in the case of *R. D. Shetty v. International Airport Authority of India* (1979) 3 SCR 1014: as follows :—

"It is now well settled that Article 14 strikes at arbitrariness in State action and ensures fairness and equality

of treatment. It requires that State action must not be arbitrary but must be based on some rational relevant principle which is non-discriminatory; it must not be guided by any extraneous or irrelevant considerations, because that would be denial of equality. The principle of reasonableness and rationality which is legally as well as philosophically an essential element of equality or non-arbitrariness is projected in Article 14 and it must characterise every State action whether it be under authority of law or in exercise of executive power without making of law".

13. We have already stated herebefore that the provisions of Rules 6 (4) (i) read with 6 (iii) (a) are irrational, arbitrary and unreasonable inasmuch as there is no nexus to the object sought to be achieved by introducing the age restriction in regard to appointment of Assistant Judge by promotion from amongst members holding posts of Civil Judges (Junior Division) and those in the cadre of Civil Judges (Senior Division) whose names have been entered in the select list. We have also held that though the post of Assistant Judge as well as the post of District Judge belong to the Senior Branch of Gujarat Judicial Service, yet in the higher cadre of District Judge no such age bar has been introduced. Moreover, as been stated by the learned counsel appearing on behalf of the High Court of Gujarat that this rule regarding age restriction which was originally introduced in the recruit-



**B. C. Ray**  
**Judge**  
**Supreme Court of India**

at rules of Judicial Service in the  
 ngual State of Bombay has subsequ-  
 y been deleted and discontinued in  
 relevant Recruitment Rules of Maha-  
 tra Judicial Service, it is curious  
 this archaic, unreasonable and irra-  
 al rule which is ex facie arbitrary  
 discriminatory has been allowed to  
 continue in the Gujarat Judicial Service  
 Recruitment Rules 1961 as amended up  
 1979.

14. We wish to make it clear that  
 observations made hereinbefore  
 ould not be construed to mean that  
 re cannot be any fixation of age of  
 erannuation in different grades of  
 er services namely armed forces, air  
 ce and naval force. In such services  
 fixation of different age of superan-  
 ion in different grades may be made  
 public interest in order to ensure ex-  
 lence in service as well as merit and  
 ciency which to a great extent de-  
 nd on pheysical fitness apart from  
 rit.

15. In the premises aforesaid, the  
 ovisions of Rule 6 (4) (i) and Rule 6

(4) (iii) (a) of the Gujarat Judicial Ser-  
 vice Recruitment (Amended Rules), 1979  
 are invalid and had as it are unreasona-  
 ble, irrational, arbitrary and discrimina-  
 tory, and violating the equality clause  
 envisaged in Articles 14 and 16 of the  
 Constitution of India.

16. These rules in so far as they  
 impose age restriction in the matter of  
 promotion to the post of Assistant  
 Judge are liable to be quashed and set  
 aside and the judgement of the High  
 Court of Gujarat is also set aside. We  
 direct that the name of this appellant  
 shall be deemed to have been continued  
 in the select list of 1983-84 and his case  
 for appointment to the post of Assistant  
 Judge shall be considered on that basis  
 by the authorities concerned. If he is  
 so appointed to the post of Assistant  
 Judge, he shall get his due seniority  
 and all retiral benefits reckoning his  
 service on that basis. The appeal is  
 accordingly allowed. There will be no  
 order as to costs.

Appeal allowed.



IT IS THE ESSENCE OF DEMOCRACY  
TO OBEY  
NO MASTER BUT THE LAW



## OBSERVATION

(A) Subordinate Civil Courts Ministerial Establishment Rules (1947), Rr 5, and Appendix II—Rules for the Recruitment of Ministerial Staff to the Subordinate Offices (1950), Rr. 3, 5, 6, 7,—Recruitment of ministerial staff—Provision for, made in 1947 Rules—Promulgation of 1950 Rules in supersession of existing Rules—1950 Rules in supersession of existing Rules—1950 Rules making some modification in syllabus for examination—Entire 1947 Rules cannot be said to be repealed by implication by 1950 Rules. (General Clauses Act (10 of 1897) S. 6 ).

(B) Subordinate Civil Courts Ministerial Establishment Rules (1947), Rr. 5, and Appendix II—Rules for the Recruitment of Ministerial Staff to the Subordinate Offices (1950), Rr. 3, 5, 6, 7—Subordinate Civil Courts Ministerial Establishment (Amendment) Rules (1969), Rr. 2, 3—Recruitment of ministerial staff by Competitive test for, held in 1981—Test held in accordance with 1950 Rules is proper—Amendment Rules of 1969 do not effectively substitute 1950 Rules 1987—All GJ) 541, Reversed General Clauses Act (10 of 1897) S. 6); (interpretation of Statutes—Implied repeal).

(C) Constitution of India Art. 226—Writ petition—Grant of relief—Petitioner challenging validity of competitive exam as not held as per law—Petitioner appearing for examination without protest—Petition filed on realisation that he would not succeed—Relief ought not to be granted to petitioner—All CJ 541, Reversed.

## OBSERVED BY

Mr. A. P. Sen, Mr. E. S. Venkataramiah and Mr. B. C. Ray,  
Hon'ble Chief Justice and Judges, Supreme Court of India.

## IN

Civil Appeal No. 2999 of 1985, decided on 18-3-1986 in the case of Om Prakash Shukla, Appellant v. Akhilesh Kumar Shukla and others, Respondents.

## TEXT

Venkataramiah, J:—This appeal by special leave is filed against the judgment and order of the High Court of Allahabad dated April 12, 1985 in Writ Petition No. 3961 of 1982 by which the High Court of Allahabad quashed the results of the competitive examination conducted by the District Judge of Kanpur in

September, 1981 for selecting candidates for appointment to the vacancies in Grade III of the ministerial staff in the Subordinate Courts in the District of Kanpur.

9. Before the commencement of the Constitution, recruitment to the ministerial establishment in the Subor-



dinate Civil Courts of the United Provinces was regulated by the Subordinate Civil Courts Ministerial Establishment Rules'). The said Rules were promulgated by the Governor of the United Provinces on August 1, 1947. The expression 'Ministerial Establishment' was defined by R. 2 (c) of the 1947 Rules as the staff of the Subordinate Civil Courts consisting of ministerial servants as defined in Fundamental Rule (17), Financial Handbook, Vol. 11, Part II. According to the definition given in R. 2 (e) of the 1947 Rules the expression Subordinate Civil Courts' included the Courts of District and Sessions Judge, Additional District and Sessions Judges, Civil and sessions Judges, Civil Judges, Additional Civil and Sessions Judges, Civil Judges Additional Civil Judges, Munsifs, Additional Munsifs, and Courts of Small Causes subordinate to the High Court of Judicature at Allahabad or the Chief Court of Oudh at Lucknow. R. 5 of the 1947 Rules prescribed the academic qualifications which a person should possess for being a candidate to a post in the ministerial establishment. It reads as follows :

"5. Academic qualifications-No person who is not already on the staff attached to a subordinate civil court shall be appointed to a post in the ministerial establishment unless;

(a) he has passed at least the High School examination conducted by the Board of High School and Intermediate Education, United Provinces or any

other examination which has been may be declared by the Governor to be equivalent thereto;

(b) he possesses a thorough knowledge both of Urdu and Hindi;

(c) he possesses in the case of a candidate for the post of stenographer a diploma or certificate from a University or a recognised shorthand and typewriting institution, showing that he possesses a speed of at least 100 words in shorthand and 35 words per minute in typewriting."

3. Rule 11 of the 1947 Rules which is relevant for the purposes of this case reads as follows : -

"11. The recruitment shall be based on the results of a competitive examination, and an interview by the District Judge at the headquarters of the judgeship the examination and interview shall be held in the manner laid down in Appendix II.

Provided that the District Judge may delegate any one or more of the functions other than the function of interviewing the candidates to a senior civil judge or senior munsif in respect of the examination held under this rule"

4. Appendix II of the 1947 Rules which contains the details regarding the manner in which the competitive examination was to be held reads thus

#### "APPENDIX II (VIDE RULE II)

The examination shall be in three parts.

(1) Compulsory subjects 350 marks Total



Optional subjects	50 marks	500
Interview	100 marks	
Compulsory subjects shall be—		
(a) Translation from English to Urdu		
(b) Translation from English to Hindi		
	-Total	
(c) Translation from Urdu to English		200
(d) Translation from Hindi to English		
(e) Precis writing		50
(f) Dictation		100
Optional subjects—		
Shorthand and typewriting		50

In the optional subjects no marks shall be awarded to any candidate who does not reach the minimum standard required in the note to R. 14

Any clerk who is already on the establishment and is not qualified as a stenographer may sit for the examination in typewriting and shorthand alone and will be eligible for appointment as stenographer if he qualifies."

5. By virtue of the provisions of Article 313 and of Article 372 of the Constitution, the 1947 Rules continued to be in force even after the commencement of the Constitution. But on July 5, 1950 the Governor of Uttar Pradesh promulgated rules for the recruitment of ministerial staff to the subordinate offices in the State of Uttar Pradesh including the offices of subordinate Civil Courts in exercise of the powers conferred on him by the proviso to Article 309

of the Constitution of India in supersession of all existing rules and orders on the subject. These rules were called the 'Rules for the Recruitment of Ministerial Staff to the Subordinate Offices, 1950' (hereinafter referred to as the 1950 Rules'). Rule 2 of the 1950 Rules defined the term 'Subordinate Office' as including all offices under the control of the Governor of Uttar Pradesh other than those of the Secretariat, the State Legislature, the High Court and the Public Service Commission, Rule 3 of the 1950 Rules provided that the recruitment to the lowest grade of the ministerial staff in a subordinate office shall be made on the basis of a competitive test Rules 5, 6 and 7 of the 1950 Rules read as follows :

"5. Tests to be held annually—

The competitive tests shall be held at least once a year and at the time specified in the Schedule by each head of a subordinate office for posts not requiring technical knowledge, e. g. stenography :

Provided that if the strength of any office does not warrant annual recruitment, or recruitment in a particular year, a competitive test shall be held whenever it becomes necessary to recruit a ministerial servant to the office.

6. Subject of the tests—(1) The competitive tests shall comprise a written test as well as an oral test.

(2) The subjects of the tests and the maximum marks on each subject shall be as follows :



Subjects	Marks
Oral	
(i) Personality	25
(ii) General Knowledge and suitability for the particular post	25
Written	
(i) Simple drafting	50
(ii) Essay and Precis writing	50
(iii) Hindi	50
Optional	
(i) Typewriting and shorthand	50
(ii) English	50

**Note :** A candidate must take one of the two optional subjects and may take both.

7. Selection of candidates —(1) On the results of the test, the head of the subordinate office shall select a number of candidates sufficient to fill the number of vacancies as ascertained in R. 3 and offer to them appointments as and when the vacancies occur, according to the order of merit disclosed at the test.

(2) No one who has not been selected in accordance with sub-rule (1) shall be appointed to any vacancy unless the list of selected candidates is exhausted.

(3) Casual vacancies may be filled up by appointing persons who have not taken the test but their further retention shall depend on their taking the next test and being selected in it.

6. In the Schedule attached to the 1950 Rules it was provided that for the

offices of the subordinate Civil Courts the competitive examination should be held in August second week every year. The relevant entry in that Schedule reads as follows :—

“Judicial (A) Department

(1) Offices of Subordinate Civil Courts—August second week”

7. The 1950 Rules did not, however, expressly say that the 1947 Rules had been superseded by these Rules. But it is significant to note that the 1950 Rules clearly stated that the Government had framed them in supersession of all existing rules and orders on the subject for recruitment to the ministerial establishments of subordinate offices under his control. The clear effect of the 1950 Rules therefore was that the 1947 Rules stood superseded by the 1950 rules as regards the subjects prescribed for the test and the manner of the examination to be held for the purpose of selecting candidates for the ministerial staff in the Civil Courts of the State of Uttar Pradesh. To be precise, Rr. 9 to 11 and Appendix II of the 1947 Rules were superseded. The two reasons in support of the above view are : (i) that in the definition of the expression ‘Subordinate Office’ only the offices of the Secretariat, the State Legislative, the High Court and the Public Service Commission stood excluded and (ii) the offices of the Subordinate Civil Courts were included in the Schedule to those Rules. On its administrative side the High Court also understood that the 1950 Rules were applicable insofar as recruitment to the ministerial staff in



The Civil Courts was concerned. This is evident from a letter written by Shri M. P. Singh, Joint Registrar of the High Court of Allahabad to all the District Judges in the State of Uttar Pradesh on February 12, 1973 which is as under: from.

M. P. Singh, B. A., LL.B.,  
Joint Registrar,  
High Court of Judicature at  
Allahabad.

All the District Judges,  
Subordinate to the High Court of  
Judicature at Allahabad.

**CIRCULAR LETTER**

No. 14/ve.4 Dated Allahabad  
February 12, 1973

Subject :—Recruitment to the establishment of the Subordinate Civil Courts.

It has been brought to the notice of the court that many District Judges face a lot of difficulties at the instance of the Employment Exchange in making recruitments to their establishments. Broadly speaking the difficulties pointed out by them are as under :

1. Quite often the District Judges, in the list of approved candidates having exhausted, have to recruit candidates directly without subjecting them to a regular test prescribed under the rules for filling up casual vacancies and for meeting the requirements of newly created additional courts at short notice and such candidates continue in the employment of the civil courts for a considerable time, but when a test is

held for recruitment, the Employment Exchange either refuses to sponsor the names of those candidates or withholds their applications for one reason or the other and consequently such candidates are prevented from taking up the test.

2. Some times the Employment Exchange, while forwarding the applications of candidates, withholding applications of such candidates who appear to be deserving and suitable to the District Judges without assigning any reason and this compels the District Judges to recruit candidates only from amongst the candidates whose applications are forwarded by the Employment Exchange.

In order to obviate the difficulties, the court has examined the whole scheme and the rules and within framework of the existing rules and Government orders on the subject, the following procedure is laid down for our guidance:

While following the procedure laid down in existing rules, published under Government Notification No. O.111/XI - -50 dated July 11, 1950 (which was adopted in suppression of Rr. 9 to 12 of the U. P. Subordinate Civil Courts Ministerial Establishment Rules 1947) and amplified in G. O. No. O-2248/II-8-III-1950 dated August 30, 1950 the District Judge should in addition himself advertise his requirement under intimation to the Employment Exchange and while doing so he should take care to make it clear that all applications are to be addressed to him and routed



through the Employment Exchange. The District Judge should further require that candidates should send advance copies of their applications direct to the District Judge which would go to ascertain whether all applications have been forwarded to him by the Employment Exchange or not. However, if on receiving the applications from the Employment Exchange, it is found that applications of certain suitable candidates have been withheld by the Employment Exchange, the District Judge may in his discretion, permit such candidates to take the test as contemplated in paragraph 7 of the G. O. dated August 30, 1950 referred to earlier.

In the case of candidates who are appointed to fill up casual vacancies without appearing in the regular test prescribed under the rules and are already working on the staff of the Civil Court concerned, they should be treated as departmental candidates and should be allowed to take the test without any reference to the Employment Exchange in order to enable them to qualify for regular appointment.

Yours faithfully  
 Sd/-

M. P. Singh  
 Joint Registrar

(Underlining by us)

8. From the above letter it is clear that the High Court understood that Rr. 9 to 12 of the 1947 Rules including R. 11 which prescribed the manner of examination (and Appendix II to the 1947 Rules which prescribed details regarding the subjects in the

examination had to be held) had superseded by the 1950 Rules.

9. In the meanwhile in exercise of his powers under proviso to Article 309 of the Constitution, the Governor had promulgated by the Subordinate Civil Courts Ministerial Establishment (Amendment) Rules, 1969 on September 20, 1969 amending the 1947 Rules (hereinafter referred to as the Amending Rules'). The 1969 Amending Rules read as follows :

"No. 49 (10/69 Nyaya (Ka-2)

September 20,

In exercise of the powers under the proviso to the Article 309 of the Constitution, the Governor is pleased to amend the following rules with a view to amend the Subordinate Civil Courts Ministerial Establishment Rules, 1947 promulgated with Government notification No. 2494/VII-612-40 dated August, I, 1947.

#### RULES

1. Short title and commencement

(i) These Rules may be called the Subordinate Civil Courts Ministerial Establishment (Amendment) Rules, 1969 (III) they shall come into force with effect from the date of their publication in the Gazette.

2. Amendment of R. 5 : In the Subordinate Civil Courts Ministerial Establishment Rules, 1947 (hereinafter referred to as the said rules), for the rules as set out in Column 1, the rules set out in column 4 shall be substituted

(See table on)

10. The existence of these Amending Rules



g Rules of 1969 was not taken note of by the High Court when the letter of the Joint Registrar dated February 12, 1973 was addressed to all the District Judges. It appears from the said letter that the High Court was following the 1950 Rules even after the promulgation of the 1969 amending Rules for purposes of holding the competitive examination for recruitment to be ministerial staff in the Civil Courts. Then came the Subordinate Offices Ministerial Staff (Direct Recruitment) Rules, 1975 (hereinafter referred to as the 1975 Rules') promulgated by the Governor under the proviso to Article 309 of the Constitution. The said rules were promulgated in supersession

of all existing rules and orders on the subject R. 2 of the 1975 Rules which dealt with their application read as follows :

**'2. Application of these rules. (1)**

These rules shall govern recruitment to all the ministerial posts of the lowest grade, other than the posts of stenographer (which are required to be filled by direct recruitment and which are outside the purview of the public Service Commission) in all subordinate offices under the control of the Government but excluding the Secretariat, the offices of State Legislature, Lokayukt, Public service.

**Column 1**

5. Academic qualifications :— No person who is not already on the staff attached to a subordinate civil court shall be appointed to a post in the ministerial establishment unless :—

(a) he has passed at least the High School Examination conducted by the Board of High School and Intermediate Education United Provinces or any other examination which has been or may be declared by the Governor to be equivalent thereto;

(b) he possesses a thorough knowledge both of Urdu and Hindi;

(c) he possesses in the case of a candidate for the post of Stenographer, a diploma or certificate from a University of a recognised Shorthand typewriting Institution, showing that he possesses a speed of at least 100 words per minute in Shorthand and 35 words per minute in typewriting

**Column 4**

Academic qualification : No person who is not already on the staff attached to a subordinate Civil Court shall be appointed to a post in the ministerial establishment unless :—

(a) he has passed at least the Intermediate Examination conducted by the Board of High School and Intermediate Education, U. P. or any other examination which has been or may be declared by the Governor to be the equivalent thereto;

(b) he possesses a thorough knowledge both of Urdu and Hindi;

(c) he possesses in the case of a candidate for the post of Stenographer a diploma or certificate from a University or a recognised Shorthand and typewriting Institution showing that he possesses a speed of at least 100 words per minute in typewriting (sic).



### 3. AMENDMENT OF APPENDIX II

### Column II

#### Column I

Existing Appendix II	Marks
The examination shall be in three parts :	
1. Compulsory subjects	350
2. Optional subjects	50
3. Interview	100

Total 500

Compulsory subjects shall be	
(a) Translation from English to Urdu	50
(b) Translation from English to Hindi	50
(c) Translation from Urdu to English	50
(d) Translation from Hindi to English	50
(e) Precis writing	50
(f) Dictation	100

#### OPTIONAL SUBJECTS :

Shorthand & Typewriting 150  
 In the optional subject no marks shall be awarded to any candidate who does not reach the minimum standard required in the note to rule 14.

Any clerk who is already on the Establishment and is not qualified as a stenographer may sit for the examination in typewriting and shorthand alone and will be eligible for appointment as stenographer if he qualifies.

5. In the said Rules for the Appendix as set out in column 1, the Appendix as set in column 2 shall be substituted.

Appendix as hereby substituted Ma  
 The Examination shall be in.

three parts :

1. Compulsory subjects
2. Optional subjects
3. Interview

Total

Compulsory subjects shall be

- (a) Translation from English to Hindi
- (b) Translation from Hindi to English
- (c) Hindi Drafting (Added)
- (d) Hindi Precis writing
- (e) English Drafting (Added)
- (f) Dictation

#### OPTIONAL SUBJECTS :

Shorthand & Typewriting

In the optional subject no marks shall be awarded to any candidate who does not reach the minimum standard required in the note to rule 14.

Any clerk who is already on the Establishment & is not qualified as a Stenographer may sit for the examination in typewriting and shorthand alone and will be eligible for appointment as Stenographer if he qualifies."



Commission, Uttar Pradesh, High Court, Subordinate Courts under the control and superintendence of the High Court, the Advocate General, Uttar Pradesh and of the establishments under the control of the Advocate General.

11. From R. 2 of the 1975 Rules which is set out above, it is clear that said Rules were not made applicable to the Secretariat, the offices of the Legislature, Lokayukta, Public Service Commission, High Court, the Subordinate Courts under the Control and Superintendence of the High Court and all the establishments under the control of the Advocate General. The 1950 Rules prescribed the qualifications and the pattern of a competitive examination for purposes of recruitment in substitution of what had been prescribed by the 1947 Rules in respect of subordinate offices to which the 1975 Rules applied. Sub-rule (1) of R. 20 of the 1975 Rules expressly provided as follows :

“20. Repeal and validation :— (1) The Rules for the recruitment of ministerial staff in the Subordinate offices published under notification No. O-1119/IU-10, dated July 11, 1950 as amended from time to time, shall be, and be deemed to have been repealed with effect from June, 5, 1974”.

12. It was after the promulgation of the 1975 Rules that the competitive examination, with which we are concerned, was held by the District Judge Kanpur. The said examination was

held in September 1981 and its results were announced on July 25, 1983. Respondent No. 1 and many others appeared in the said examination. The competitive examination was, however, held in accordance with the 1950 Rules. The 1969 Amending Rules were not, however, followed. Respondent No. 1 who had appeared for the competitive examination was not successful. Aggrieved by the result of the examination he filed the writ petition before the High Court of Allahabad, out of which this appeal arises. His principal contention before the High Court was that the competitive examination which had been held in accordance with the 1950 Rules was an unauthorised one and that it should have been held in accordance with the 1947 Rules as amended by the 1969 Amending Rules. The High Court held that it was evident that the intention of promulgating the 1950 Rules was only to prescribe a syllabus different from what had been prescribed in the 1947 Rules but the modification made by the 1950 Rules did not, however, modify the rest of the 1947 Rules. The High Court was of the opinion that “therefore, it follows that the 1950 Rules being later in time superseded 1947 Rules to the extent of its inconsistency. After the enforcement of 1950 Rules competitive tests for holding selection for appointment to the Ministerial Establishment of Subordinate Courts was required to be held in accordance with the syllabus of 1950 Rules and not in accordance with Appendix II of 1947 Rules. In other respects the 1947 Rules continued to be effective.”



13. The High Court then found that on the promulgation the 1969 Amending Rules the syllabus by the 1950 Rules could not be followed. The High Court observed on this question as follows :

“The question, however, arises what was the effect of Subordinate Civil Courts Ministerial Establishment (Amendment) Rules, 1969. As noted earlier, the Rules of 1969 were framed by the Governor, amending Appendix II of 1947 Rules. The notification dated September 20, 1969, under which the Rules were enforced, does not contain any reference to 1950 Rules. It appears that while amending the 1947 Rules, the Governor failed to notice that Appendix II of 1947 Rules had already been superseded by Rule 6 of 1950 Rules. However, it is evident that the intention was to prescribe different syllabus than that prescribed by 1950 Rules. There is no doubt that by the 1969 Rules, the Governor intended to lay down a syllabus for holding competitive examination for selection and appointment to the ministerial establishment of Subordinate Courts which was quite different from the syllabus prescribed by R. 6 of 1950 Rules as well as Appendix II of 1947 Rules. The 1969 Rules were also framed by the Governor in respect of the same subject matter as laid down R. 5 of 1950 Rules. Since 1969 Rules were framed later in time by the same authority on the same subject, it must be held that the syllabus prescribed by the Amending Rules superseded the earlier rules on the subject.

14. The High Court gave one reason for holding that the 1950 Rules were no longer in force in the year 1974. The High Court was of the view that the 1950 Rules having been repealed by Rule 20 of the 1975 Rules they were no longer effective from June 5, 1974. It observed thus :

“The 1969 Rules, no doubt purport to amend Rule 5 and Appendix II of 1947 Rules. The language of the Rules of 1969 indicates that apart from the rules being in the nature of an amendment, the Governor intended to lay down specific rules prescribing educational qualifications and syllabus for holding the examination for recruitment to the Ministerial Staff of the Subordinate Courts. Even if the 1969 Rules could not be effective during the period when the 1950 Rules were in force, the same would be fully effective after June 5, 1974, after the repeal of 1950 Rules. We, therefore, hold that in any event after June 5, 1974, recruitment to the ministerial staff of Subordinate Courts could be held only in accordance with 1947 Rules read with 1969 Rules and not in accordance with 1950 Rules.

15. The High Court was of the view that since within the jurisdiction of Kanpur the examination had not been held in accordance with the syllabus prescribed by the 1947 Rules as amended by the 1969 Amending Rules all those who were successful and selected for appointment had no legal right to be appointed. It accordingly quashed the examination held in 1981 by the District Judge of Kanpur, the results



which had been announced in 1983 by a judgement dated April 12, 1985. The High Court clarified that all the candidates who had applied for the 1981 examination were, however entitled to appear for the fresh examination to be held by the District Judge of Kanpur. It further observed that in the other district of Uttar Pradesh where examinations had been held under the 1950 Rules and which had not been challenged the selection and appointment made in pursuance thereof should be treated as valid and would not be rendered invalid on the ground that any other view would cause great hardship which will not be in the public interest'. The result of the judgement was that only those who had been selected or appointed on the basis of the competitive examination held by the District Judge, Kanpur lost their appointments or the right to be appointed but all other candidates who had been selected on the basis of examinations held in accordance with the 1950 Rules in the rest of the State of Uttar Pradesh continued in their posts.

16. Aggrieved by the judgement of the High Court, the appellant who was one of the selected candidates in the Kanpur examination, has filed this appeal by special leave.

17. In this case the deficiencies in the drafting of the rules and the inadvertence on the part of the High Court in complying with them pose some difficulty in arriving at a just solution. There is no dispute that the

1947 Rules made appropriate provisions regarding the recruitment of candidates to the posts in the ministerial establishment in the Subordinate Courts in the former United Provinces and they continued to be in force till July 11, 1950. On July 11, 1950 the 1950 Rules were promulgated. They were applicable not merely to the ministerial establishments in Civil Courts but to the ministerial establishments in several other offices. They were promulgated in supersession of all existing rules and orders on the subject. They prescribed that recruitment to the ministerial staff in a subordinate office to which the said rules were applicable should be made on the basis of a competitive test and also provided for the mode of calculation of vacancies, the period during which competitive examinations should be held the subjects for the test and the marks assigned to each of them and the method of selection of successful candidates. They also provided that appointments to higher posts in the ministerial staff of those offices should be made by promotion Rules 9 to 12 of the 1947 Rules and Appendix II to it which dealt with above topics thus stood superseded. The other parts of the 1947 Rules which dealt with the nationality, domicile and residence of the candidates, their academic qualifications, character and physical fitness, the appointing authority, probation and confirmation, seniority, punishment, rate of pay, transfers and regulations of conditions of service remained intact since the 1950 Rules did not



make any provision as regards these topics. Hence we do not agree with the argument urged on behalf of the appellant that the 1947 Rules stood superseded in their entirety by the 1950 Rules relying upon the opening words of the 1950 Rules which read thus :

“In exercise of the powers conferred by Article 309 of the Constitution of India, and in supersession of all existing rules, and orders on the subject.....”  
 (Emphasis supplied)

18. “In supersession of all existing rules and orders on the subject” can only refer to those matters in the existing rules which correspond to the matters dealt with by the 1950 Rules. We have explained earlier the other subjects in the 1947 Rules which were not covered by the 1950 Rules. Hence the argument based on the assumption that the entire 1947 Rules had been repealed by implication and no amendment could be made to the 1947 Rules has to be rejected. The High Court was, therefore, right in observing that the whole of the 1947 Rules did not come to an end on the promulgation of the 1950 Rules. The problem, however, does not get solved thereby as we shall presently show.

19. The 1969 Amending Rules specifically amended the 1947 Rules. These 1969 Amending Rules appear to have been made after consultation with the High Court as can be seen from the letter dated November 30, 1968 written by the Joint Registrar of the High Court to the Joint Legal Remembrancer of

the Government of Uttar Pradesh. The 1969 Amending Rules were published in the Uttar Pradesh Gazette dated October 9, 1969. By these Rules, rule 5 of the 1947 Rules was amended. Rule 5 dealt with the minimum academic qualification which a candidate for post in the ministerial establishment of a Subordinate Civil Court should possess. The other amendment related to the substitution of the former Appendix II which related to the subjects prescribed for the competitive examination and the marks assigned to each of them. It obtained before the 1950 Rules came into force by a new Appendix which had already been set out above.

20. Rule 11 of the 1947 Rules which required the District Judge to hold the examination in accordance with the former Appendix II of the 1947 Rules which also stood superseded by the 1950 Rules in view of rules 5 and 6 of the 1950 Rules which dealt with the same subject, was however not replaced nor a corresponding rule authorising the District Judge to hold the competitive examination in accordance with the new Appendix II was introduced by the 1969 Amending Rules into the 1947 Rules simultaneously. The result was that while the new Appendix II again reappeared in the 1947 Rules prescribing certain subjects and marks assigned to them, the authority who should hold the competitive examination was not again prescribed in the 1947 Rules. It was necessary to re-enact rule 11 of the 1947 Rules because it also stood repealed.



by the 1950 Rules which had made provision with regard to the topic contained in the former rule 11. The legal position that by the promulgation of the 1950 Rules, the former rules 9 to 12 of the 1947 Rules stood repealed by necessary implication is accepted even by the High Court in its letter dated February 12, 1973 referred to above. Therefore the former rule 11 should have been re-enacted either in the same form or with modification and brought back to life to given effect to the new Appendix II reintroduced in the 1947 Rules. Without such reintroduction of rule 11, the mere reintroduction of Appendix II in the 1947 Rules by the 1969 Amending Rules would be meaningless and ineffective as the authority who conducted the examination remained unspecified. The method of selection of candidates also remained unspecified. In effect whatever was provided in rules 9 to 12 of the 1947 Rules which was needed for conducting the examination and selecting candidates was however unavailable. It is not correct to assume that the old rules 9 to 12 also automatically revived along with Appendix II without an express provision reintroducing them. If we are not trying to be technical, it is to be noted that the 1969 Amending Rules do not expressly state that the 1950 Rules would no longer be applicable to the ministerial establishments of the Subordinate Civil Courts. They also did not repeal the provisions referring to the Judicial Department—Subordinate Civil Courts, which

found a place in the schedule to the 1950 Rules. The discontinuance of the application of the 1950 Rules to the ministerial establishments of the Subordinate Civil Courts can only be inferred by relying upon the rule of implied repeal provided the said rule is applicable. An implied repeal of an earlier law can be inferred only where there is the enactment of a later law which had the power to override the earlier law and is totally inconsistent with the earlier law, that is, where the two laws—the earlier law and the later law—cannot stand together. This is a logical necessity because the two inconsistent laws cannot both be valid without contravening the principle of contradiction. The later laws abrogate earlier contrary laws. This principle is, however, subject to the condition that the later law must be effective. If the later law is not capable of taking the place of the earlier law and for some reason cannot be implemented, the earlier law would continue to operate. To such a case the rule of implied repeal is not attracted because the application of the rule of implied repeal may result in a vacuum which the law making authority may not have intended. Now, what does Appendix II contain. It contains a list of subjects and marks assigned to each of them. But who tells us what that list of subjects means. It is only in the presence of rule 11 one can understand the meaning and purpose of Appendix II. In the absence of an amendment re-enacting rule 11 in the



1947 Rules, it is difficult to hold by the application of the doctrine of implied repeal that the 1950 Rules have ceased to be applicable to the ministerial establishments of the Subordinate Civil Courts. The High Court overlooked this aspect of the case and proceeded to hold that on the mere reintroduction of the new Appendix II into the 1974 Rules, the examinations could be held in accordance with the said Appendix. We do not agree with this view of the High Court.

21. There is also no material before the Court to show that after the 1969 Amending Rules, examinations were held in the different districts Uttar Pradesh in accordance with the 1947 Rules as amended by the 1969 Amending Rules. No body including the High Court appears to have taken notice of the amendment. On the other hand examinations have been held according to the 1950 Rules even after the above 1969 amendment. The District Judge has filed a counter-affidavit stating that the examinations were held in 1981 in this case in accordance with the 1950 Rules and not in accordance with the 1947 Rules as amended by the 1969 Amending Rules. The letter of the High Court dated February 12, 1973 shows that it treated the 1950 Rules as the existing Rules in 1973 even after the 1969 Amending Rules came into force because it is stated in that letter as follows : —

“While following the procedure laid down in the existing rules, publi-

shed under Government Notification No. O-1119/XI-8.50 dated July 11, 1950 (which was adopted in supersession of rules 9 to 12 of the U.P. Subordinate Civil Courts Ministerial Establishments Rules 1947) and amplified in G.O.-No. 2248/II-III-1950 dated August 30, 1950, the District Judge should.....

(Emphasis added)

Further it appears that in the year 1981 in some other districts of Uttar Pradesh examinations were held as per the 1950 Rules. This is borne out by the observation of the High Court in its judgement where it has expressed its reluctance to set aside the results of the examinations in the other districts and confined the operation of its judgement to Kanpur District only. The 1969 Amending Rules appear to have been ignored by some District Judges. In the circumstances having regard to the lacuna created by the non-repromulgation of rule 11 of the 1947 Rules it has to be held that there was no effective substitution of the 1950 Rules brought about by the 1969 Amending Rules. The 1950 Rules should therefore be held to be operating even in the year 1981. Hence the examinations held according to them cannot be held to be bad.

22. We do not agree with the view of the High Court that the 1950 Rules have been repealed by the 1975 Rules insofar as the Subordinate Civil Courts are concerned. It is true that rule 2 of the 1975 Rules clearly stated that the 1950 Rules had been repealed But the



**E. S. Venkataramiah**  
**Judge**  
**Supreme Court of India**

Rules did not apply to the subordinate courts under the control and superintendence of the High Court. Since the 1950 Rules insofar as they applied to the subordinate courts continued to be in force. The finding of the High Court on this question is erroneous and is liable to be set aside.

23. Moreover, this is a case where the petitioner in the writ petition should not have been granted any relief. He appeared for the examination without protest. He filed the petition only after he had perhaps realised that he would not succeed in the examination. The High Court itself has observed that the setting aside of the results of examination held in the other districts would cause hardship to the candidates who appeared there. The same yardstick should have been applied to the candidates in the District of Kanpur. They were not responsible for the conduct of the examination.

24. For the foregoing reasons we hold that the judgement of the High Court should be set aside. We accordingly set aside the judgement of the High Court and dismiss the Writ Petition. The appellant and all other successful candidates at the 1981 examination held in

Kanpur shall be appointed in accordance with the Rules. We further direct that they shall be given the salary, allowances, increments and seniority to which they would have been entitled but for the judgement of the High Court. But they will not be entitled to any salary and allowances for the period during which they have not actually worked. We also make it clear that if in any other centre, selections and appointments have been made on the basis of the 1969 Amending Rules they shall remain undisturbed.

25. The order passed by the High Court in the connected writ petition No. 10224 of 1983 on its file is also set aside. Similarly the order passed in writ petition No. 5073 of 1984 on the file of the High Court is also reversed. There shall be a common order in these connected cases as directed in this appeal.

26. The appeal is accordingly allowed. No costs.

27. The High Court may take steps, if it so desires, to promulgate a fresh set of Rules of recruitment for the staff in the subordinate courts early.

Appeal allowed.



Report No. 27 p 16

IT IS THE ESSENCE OF DEMOCRACY  
TO OBEY  
NO MASTER BUT THE LAW



**A. P. Sen**  
**Judge**  
**Supreme Court of India**

### OBSERVATION

(A) Constitution of India, Arts 309 Proviso; 311; 226—Railway Servants (Discipline and Appeal) Rules (1968), Rr. 22 (2), 6 (vii), 10 (5), 18 (ii)—Railway Servant—Penalty of removal under R. 6 (viii)—Appeal before Railway Board under R. 18 (ii)—Dismissal of appeal—Mechanical reproduction of phraseology of R. 22 (2)—Held, there was non-compliance with requirements of R. 22 (2)—Impugned order must be set aside—Natural justice—Right to make representation to proposed penalty taken away by Forty—Second Amendment—Appellate authority, all the more, must pass reasoned order—L.P.A. No. 178 of 1983 (15-2-1984 (Delhi)) Reversed.

(A) Interpretation of Statutes—*Pari materia*—Rule 27 (2) of the Central Civil Service (Classification, Control and Appeal) Rules, 1965 is *in pari materia* with R. 22 (2) of the Railway Servants (Discipline and Appeal) Rules, 1968.

### OBSERVED BY

Mr. A. P. Sen and Mr. B. C. Ray  
Hon'ble Judges, Supreme Court of India

### IN

Civil Appeal No. 1621 of 1986 decided on 2-5-1986 in the case of Ram Chander, Appellant v. Union of India and others, Respondents.

### TEXT

A. P. Sen, J. - The Central question in this appeal is whether the impugned order passed by the Railway Board dated March 11, 1972 dismissing the appeal preferred by the appellant, was not in conformity with the requirements of R. 22 (2) of the Railway Servants (Discipline and Appeal) Rules, 1968.

At the hearing on Feb. 13, 1986, learned counsel for the Union of India took time to enable the Railway Board to reconsider its decision as to the quantum of punishment. At the resumed

hearing on March 13, 1986 we were informed by the learned counsel that there was no question of the Railway Board reconsidering its decision. Arguments were accordingly heard on the question as to whether the impugned order of the Railway Board was sustainable in law. We heard the parties and allowed the appeal by order dated March 13, 1986 directing the Railway Board to hear and decide the appeal afresh on merits in accordance with law in conformity with the requirements of R. 22 (2) of the Rules. We now proceed to give reasons therefore.



2. The Facts. The appellant Ram Chander Shunter, Grade B at Loco Shed Ghaziabad was inflicted the penalty of removal from service under R. 6 (viii) of the Railway Servants (Discipline and Appeal) Rules, 1968 by order of the General Manager, Northern Railway dated Aug. 24, 1971. The gravamen of the charge was that the appellant was guilty of misconduct in that he had on Oct. 1, 1969 at 7.30 p.m. assaulted his immediate superior Banarsi Das, Assistant Loco Foreman while he was returning after performing his duties. The immediate cause for the assault was that the appellant had on Sept. 30, 1969 applied for medical leave for one day i. e. for Oct. 1, 1969. On that day, there was a shortage of shunters and he accordingly asked Banarsi Das to resume his duties but Banarsi Das refused to cancel the leave already granted and therefore the appellant nursed a grouse against him because he was thereby deprived of the benefit of one day's additional wages for October 2, 1969 which was a national holiday. Apparently, Banarsi Das lodged a report with the police but no action was taken thereon. More than a month later i. e. on November 17, 1969 Banarsi Das made a complaint against the appellant to his superior officers and this gave rise to a departmental proceeding. The Enquiry Officer fixed the date of enquiry on May 11, 1970 at Ghaziabad. The enquiry could not be held on that date due to some administrative reasons and was then fixed for July 11, 1970. The appellant was duly

informed of the date but he did not appear at the enquiry. The Enquiry Officer accordingly proceeded ex parte and examined witnesses. By his report dated May 26, 1971, the Enquiry Officer found the charge proved. The General Manager, Northern Railway agreed with the report of the Enquiry Officer and came to the provisional conclusion that the penalty of removal from service should be inflicted and issued a show cause notice dated May 26, 1971, in compliance the appellant showed cause but his explanation was not accepted by the General Manager who by his order dtd. August 24, 1971 imposed on the appellant the penalty of removal from service. The appellant preferred an appeal before the Railway Board under R. 18 (ii) of the Railway Servants (Discipline and Appeal) Rules, 1968 but the Railway Board by the impugned order dated March 11, 1972 dismissed the appeal. Thereafter, the appellant moved the High Court by a petition under Art. 226. of the Constitution. The learned Single Judge by his order dated Aug. 16, 1983 dismissed the writ petition holding that since the Railway Board agreed with the findings of the General Manager there was no duty cast on the Railway Board to record reasons for its decision. The appellant therefore preferred a Letters Patent Appeal before a Division Bench by its order dated Feb. 15, 1984 dismissed the appeal *interim*.

3. Rule 22 (2) of the Railway Servants Rules provided as follows :—

“22(2). In the case of an appeal



inst an order imposing any of the penalties specified in Rule 6 or enhancing any penalty specified in Rule 6 or reducing any penalty imposed under said rule, the appellate authority shall consider —

(a) whether the procedure laid down in these rules has been complied with, and if not, whether such non-compliance has resulted in the violation of any provisions of the Constitution of India or in a failure of justice;

(b) whether the findings of the disciplinary authority are warranted by the evidence on the record; and

(c) whether the penalty or the enhanced penalty imposed is adequate, inadequate, or severe;

and pass orders —

(i) confirming, enhancing, reducing or setting aside the penalty; or

(ii) remitting the case to the authority which imposed or enhanced the penalty or to any other authority with such directions as it may deem fit in the circumstances of the case.”

4. The duty to give reasons is an incident of the judicial process. So, in *P. Bhatt v. Union of India* (C. A. No. 55/81 decided on Dec. 14, 1982) : reported in 1986 Lab IC 790) this Court, in some what similar circumstances, interpreting R. 27 (2) of the Central Civil Services (Classification, Control and Appeal) Rules, 1965 which provision is *pari materia* with R. 22 (2) of the Railway Servants (Discipline and appeal) Rules, 1968, observed:

“It is clear upon the terms of R. 27

(2) that the appellate authority is required to consider (1) whether the procedure laid down in the rules had been complied with; and if not, whether such non compliance has resulted in violation of any of the provisions of the Constitution of India or in the failure of justice; (2) whether the findings of the disciplinary authority are warranted by the evidence on record; and (3) whether the penalty imposed is adequate, inadequate or severe, and pass orders confirming, enhancing, reducing or setting aside the penalty, or remit back the case to the authority which imposed or enhanced the penalty, etc.”

It was held that the word ‘consider’ in R. 27 (2) of the Rules implied ‘due application of mind’. The Court emphasized that the Appellate Authority discharging quasi-judicial functions in accordance with natural justice must give reasons for its decision. There was in that case, as here, no indication in the impugned order that the Director-General, Border Road Organisation, New Delhi was satisfied as to the aforesaid requirements. The Court observed that he had not recorded any finding on the crucial question as to whether the findings of the disciplinary authority were warranted by the evidence on record. In the present case, the impugned order of the Railway Board is in these terms :

“(1) In terms of Rule 22 (2) of the Railway Servants (Discipline and Appeal) Rules, 1968, the Railway Board have carefully considered your appeal



against the orders of the General Manager, Northern Railway, New Delhi imposing on you the penalty of removal from service and have observed as under :—

(a) by the evidence on record, the findings of the disciplinary authority are warranted; and

(b) the penalty of removal from service imposed on you is merited”.

(2) The Railway Board have therefore rejected the appeal preferred by you”.

5. To say the least, this is just a mechanical reproduction of the phraseology of R. 22 (2) of the Railway Servants Rules without any attempt on the part of the Railway Board either to marshal the evidence on record with a view to decide whether the findings arrived at by the disciplinary authority could be sustained or not. There is also no indication that the Railway Board applied its mind as to whether the act of misconduct with which the appellant was charged together with the attendant circumstances and the past record of the appellant were such that he should have been visited with the extreme penalty of removal from service for a single lapse in a span of 24 years of service. Dismissal or removal from service is a matter of grave concern to a civil servant who after such a long period of service, may not deserve such a harsh punishment. There being non-compliance with the requirements of R. 22 (2) of the Railway Servants Rules, the impugned or-

der passed by the Railway Board is liable to be set aside.

6. It was not the requirement of Art. 311 (2) of the Constitution prior to the Constitution (Forty-Second Amendment) Act, 1971 or of the rules of natural justice, that in every case appellate authority should in its order state its reasons except where the appellate authority disagreed with the findings of the disciplinary authority. In *State of Madras v. A. Srinivasan*, AIR 1966 SC 1827 Constitution Bench of this Court while repelling the contention that the impugned order by the State Government accepting the findings being in the nature of quasi-judicial proceedings was bad as it did not give reasons for accepting the findings of the Tribunal, observed as follows:—

“In dealing with the question as to whether it is obligatory on the State Government to give reasons in support of the order, imposing a penalty on the delinquent officer, we cannot overlook the fact that the disciplinary proceedings against such a delinquent officer begin with an enquiry conducted by an officer appointed in that behalf. The enquiry is followed by report and the Public Service Commission is consulted where necessary. Having regard to the material which is thus made available to the State Government and which is made available to the delinquent officer also, it seems to us somewhat unreasonable to suggest that the State Government must record its reasons



it accepts the findings of the Tribunal. It is conceivable that if the Government does not accept the findings of the Tribunal which may be in favour of the delinquent officer and chooses to impose a penalty on the delinquent officer, it should give reasons which differs from the conclusion of the Tribunal, though even in such a case, it is not necessary that the reasons would be detailed or elaborate. But where the Government agrees with the findings of the Tribunal which are against the delinquent officer, we do not think as a matter of law, it could be said that the State Government cannot impose a penalty against the delinquent officer in accordance with the findings of the Tribunal unless it gives reasons to show that the said findings were accepted by the Tribunal. The proceedings are, no, doubt, quasi-judicial; but having regard to the manner in which these enquiries are conducted, we do not think an obligation can be imposed on the State Government to record reasons in every case."

7. Again, in *Som Datt Datta v. Union of India*, (1969) 2 SCR 177, a Constitution Bench of this Court rejected the contention that the order of the Chief of the Army Staff confirming the proceedings of the Central Court Martial under S. 164 of the Army Act, 1950 and the order of the Central Government dismissing the central appeal of the delinquent officer under S. 165 of the Army Act were illegal and ultra vires as they did not give reasons in support of the findings, and summed up the legal position

in these words :

"Apart from any requirement imposed by the statute or statutory rules either expressly or by necessary implication, there is no legal obligation that the statutory tribunal should give reasons for its decision. There is also no general principle or any rule of natural justice that a statutory tribunal should always and in every case give reasons in support of its decision."

8. So also in *Tara Chand Khatri v. Municipal Corpn. of Delhi* (1977) 2 SCR 198 : (AIR 1977 SC 567), this Court observed that there was a vital difference between an order of reversal by the appellate authority and an order of affirmance and the omission to give reasons for the decision may not by itself be a sufficient ground for passing such order, relying on the test laid down by *Subha Rao J. in Madhya Pradesh Industries Ltd. v. Union of India* (1966) 1 SCR 466 :

"Ordinarily, the appellate or revisional authority shall give its own reasons succinctly; but in a case of affirmance where the original tribunal gives adequate reasons, the Appellate Tribunal may dismiss the appeal or the revision, as the case may be, agreeing with those reasons."

9. Those authorities proceed upon the principle that in the absence of a requirement in the statute or the rules, there is no duty cast on an appellate authority to give reasons where the order is one of affirmance. Here R. 22 (2) of the Railway Servants Rules



in express terms requires the Railway Board to record its findings on the three aspects stated therein. Similar are the requirement under R. 27 (2) of the Central Civil Services (Classification, Control and Appeal) Rules, 1965. R. 22 (2) provides that in the case of an appeal against an order imposing any of the penalties specified in R. 6 or enhancing any penalty imposed under the said rule, the appellate authority shall 'consider' as to the matters indicated therein. The word 'consider' has different shades of meaning and must in R. 22 (2), in the context in which it appears, mean an objective consideration by the Railway Board after due application of mind which implies the giving of reasons for its decision.

10. After the amendment of cl. (2) of Art. 311 of the Constitution by the Constitution (Forty-second Amendment) Act, 1976 and the consequential change brought about in R. 10 (S) of the Railway servants (Discipline and Appeal) Rules, 1968, substituted by the Railway Servants (Discipline and Appeal) (Third Amendment) Rules, 1978, it is no longer necessary to afford a second opportunity to the delinquent servant to show cause against the punishment. The Forty-Second Amendment has deleted from cl. (2) of Art. 311 the requirement of a reasonable opportunity of making representation on the proposed penalty and, further, it has been expressly provided inter alia in the first proviso to cl. (2) that :

“Provided that where it is proposed after such inquiry, to impose upon any such penalty, such penalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person an opportunity of making representation against the penalty proposed.”

11. After the amendment, the requirement of cl. (2) will be satisfied by conducting an inquiry in which the Government servant has been informed of the charges against him and given a reasonable opportunity of being heard. This is the essential safeguard of showing innocence at the second stage i. e. when the disciplinary authority has come to a tentative conclusion of guilt upon perusal of findings reached by the Inquiry Officer on the basis of the evidence adduced, as also against the proposed punishment, has been removed to the detriment of the delinquent officer. In view of the said amendment of Art. 311 (2) of the Constitution, R. 10 (S) of the Railway Servants Rules has been sustained to bring it in conformity with cl. (2) of Art. 311, as amended. R. 10 (5), as substituted, provides as follows :

“10 (5) If the disciplinary authority, having regard to its findings on any of the articles of charge against the railway servant on the basis of the evidence adduced during the inquiry, is of the opinion that any of the penalties specified in clause (v) to (ix) of rule 6 should be imposed on the railway servant, it shall make an order imposing such penalty and it shall not be necessary to



the railway servant any opportunity of making representation on the penalty proposed to be imposed :

Provided that in every case where it is necessary to consult the Commission, the record of the inquiry shall be forwarded by the disciplinary authority to the Commission for its advice and such advice shall be taken into consideration before making an order imposing any such penalty on the railway servant."

12. We may here mention that a corresponding change in the Central Civil Services (Classification, Control and Appeal) Rules, 1965 has been brought by substituting R. 15 (4) taking away the procedural safeguard of making a representation at the second stage i.e. before imposing punishment on the basis of the evidence at the inquiry.

13. In *Union of India v. Tulsiram Patel* (1985) 3 SCC 398, a five-Judge Bench by a majority of 4 : 1 held that where a departmental inquiry was wholly dispensed with in the three situations under the second proviso to Art. 311 (2), the only right to make a representation on the proposed penalty which was to be found in cl. (2) of Art. 311 of the Constitution prior to its amendment having been taken away by the Constitution (Forty-Second Amendment) Act, 1976, there is no provision of law under which a Government servant can claim this right. This Court last week in *Secretary, Central Board of Excise & Customs v. K. S. Mahalingam* (C. A

No. 1279/86 decided on April 24, 1986) after referring to the constitutional changes brought about observed :

"After the amendment, the requirement of cl. (2) will be satisfied by holding an inquiry in which the Government servant has been informed of the charges against him and given a reasonable opportunity of being heard."

13A. After the majority decision in *Tulsiram Patel's* case, it can no longer be disputed that the right to make a representation on the proposed penalty which was to be found in cl. (2) of Art. 311 of the Constitution having been taken away by the Forty-Second Amendment, there is no provision of law under which a Government servant can claim this right.

14. It seems to be purely academic to refer to the vintage decision of the Privy Council in *High Commissioner for India v. I. M. Lall*, 75 Indian Appeal 225 and that of this Court in *Khem Chand v. Union of India*, 1958 SCR 1080 : (AIR 1958 SC 300) following it or the plethora of decisions thereafter which have now become otiose after the Forty Second Amendment by which the words a reasonable opportunity of showing cause against the action proposed to be taken in regard to him" were deleted at the end of cl. (2) of Art. 311 and proviso to cl. (2) substituted, with the object of doing away with the second opportunity of making representation at the



stage of imposing penalty i. e. at the conclusion of the inquiry. It is however necessary to refer to these two decisions briefly with the object of showing the prejudicial effect on such delinquent Government servants. More so, because the majority decision in *Tulsiram Patel's* case (AIR 1985 SC 1416) seeks to justify the amendment effected by the Forty-Second Amendment of cl. (2) of Art. 311 by observing that 'cl. (2) of Art. 311 as originally enacted and the legislative history of that clause wholly rule out the giving of any opportunity'. We have our own reservations about the correctness of this proposition. It is not quite accurate to suggest that the opportunity of showing cause before a Government servant was dismissed, removed or reduced in rank was not contemplated by law nor justified by the legislative history.

15. In *I. M. Lall's* case, Lord Thankerton while interpreting the words 'a reasonable opportunity of showing cause against the action proposed to be taken in regard to him in sub-s. (3) of S. 240 of the Government of India Act, 1935 speaking for the Judicial Committee of the Privy Council, observed :

"In the opinion of their Lordships, no action is proposed within the meaning of the sub-section until a definite conclusion has been come to on the charges, and the actual punishment to follow it provisionally determined on. Before (prior to?) that stage, the char-

ges are unproved and the suggested punishments are merely hypothetical."

(Emphasis supplied)

That very distinguished Judge went on to say :

"It is on that stage reached that the statute gives the civil servant the opportunity for which sub-s. (3) makes provision.

and then added :

"Their Lordship would only add that they see no difficulty in the statutory opportunity being reasonably afforded at more than one stage. If the civil servant has been through an enquiry under Rule 55, it would not be reasonable that he should ask for a repetition of that stage, if duly carried out but that would not exhaust his statutory right and he would still be entitled to represent against the punishment proposed as the result of the findings of the inquiry."

16. The phrase a reasonable opportunity of showing cause against the action proposed to be taken in regard to him' appearing in sub-s. (3) of S. 240 of the Government of India Act, 1935 was reproduced in cl. (2) of Art. 311 of the Constitution as originally enacted i.e. prior to its amendment by the Constitution (Fifteenth Amendment) Act, 1963. It would appear that in the original Art. 311 (2) as it stood before the Fifteenth Amendment, the obligation to afford an opportunity at two stages, namely, at the stage of inquiry into the charges and



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Judge

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at the stage of awarding punishment was not explicitly stated in the itself. It merely required that opportunity must be given to show cause against the 'action proposed'. As stated, the obligation to offer opportunity at two stages was how reduced judicially by the Privy Council in I.M. Lall's case.

In Khemchand's case, (AIR 1954 C 300) the Court following the decision of the Privy Council in I. M. Lall's case came to the same conclusion on the word 'reasonable'. The Government servant not only be given an opportunity but such opportunity must be a reasonable one. In order that the opportunity to show cause against the proposed action may be regarded as a reasonable one, it is quite necessary that Government servant should have an opportunity, to say, if that be his case that he has not been guilty of any misconduct to merit any punishment and also that the particular punishment proposed to be given is much more drastic and severe than he deserves. It referred to the above passage from the judgement of the Privy Council in I. M. Lall's case, and observed:

Further opportunity is to be given to the Government servant after the charges have been established against him and a particular punishment is proposed to be meted out to him."

In short, the substance of the protection provided by Rules, like R. 55 referred to above, was bodily lifted out of the

rules and together with an additional opportunity embodied in S. 240 (3) of the Government of India Act, 1935 so as to give a statutory protection to the Government servants had now been incorporated in Art. 311 (2) so as to convert the protection into a constitutional. The legal consequence therefore was that:

"At the second stage, the delinquent Government servant was therefore entitled to contend—

(a) That the inquiry at which the findings were arrived at was vitiated by a breach of the principles of natural justice.

(b) That the findings were not supported by the evidence in the proceedings, or that the evidence against him was not worthy of credence or that he was not guilty of any misconduct to merit any punishment at all.

(c) That the punishment proposed could not be properly awarded on the findings arrived at, that is to say, the charges proved did not require the particular punishment proposed to be awarded."

18. After Parliament frustrated the attempt of the Government to delete the constitutional safeguard as evolved by this Court at Khem Chand's case following the principles laid down in the Privy Council decision in I. M. Lall's case by deletion of the words 'a reasonable opportunity of showing cause against the action proposed to be taken in regard to him' by the Constitu-



tion (Fifteenth Amendment) Act, 1963, it seems somewhat strange that after more than a decade the Government of the day thought it fit to remove this valuable safeguard by the Forty-Second Amendment. It is particularly important to notice how closely Members of Parliament scrutinised the motives of the Government while discussing the Fifteenth Amendment Bill and it is profitable to read the debates leading to the passing of the Fifteenth Amendment. There could scarcely be a better example of the principle that the constituent powers to amend the Constitution, however permissible, must be used with scrupulous attention to their true purpose and for reasons that are relevant and proper. A determined attempt on the part of the Government to unsettle the law as laid down by this Court was successfully frustrated on that occasion. Although the clause as originally in the Amendment Bill was deficient insofar as it conferred no express protection as regards the second stage i. e. the stage of punishment, but the Fifteenth Amendment Act as passed, introduced the requirement of giving a reasonable opportunity on the penalty proposed, after the conclusion of the inquiry into the charges and after a penalty had been provisionally determined. After considerable debate in Parliament, Shri Ashok Sen, Law Minister, intervened, in deference to the concern expressed by members representing all sections of the House over the Amendment Bill by which the Government was seeking to remove the opportunity at the second stage, and

gave an assurance that he would make an amendment, making it clear that a second opportunity in regard to the punishment proposed would be given, but such opportunity shall be on the basis of the evidence adduced at the inquiry. The Government accordingly moved the following amendment:

“And where it is proposed, in such inquiry, to impose on him any penalty, until he has been given a reasonable opportunity of making representation on the penalty proposed, but on the basis of the evidence adduced at such inquiry.”

19. We may recall the words of the Law Minister on that occasion intervening in the debate on the original draft.

“Now, Sir, as I explained, the motion was first before the President and before it went to the Joint Committee it was never the intention of the Government to vary Rule 25 of the Civil Service Rules which provide for representation by the civil servants against the penalty proposed. The assurance taken was that in future some irresponsible Government might do away with Rule 25 ignoring the assurance given to Parliament. Well, then I told the representatives of the civil servants and the representatives of the INTUC that I had come to see me to give me a draft which would make it quite clear that representation against the penalty proposed would not include any right to insist on further hearing and further evidence being given. They gave me that draft which I have accepted with



light modification.

I, therefore, dispel any idea, if there is any, that there has been any deviation from the ideals of democracy and preservation of the vital rights not only of civil servants but of the citizens. I hope we shall never deviate from that course because it is our great strength and it is through the processes of democracy that we are functioning, not through the processes of fear or force (Lok Sabha Debates, 3rd Series, Vol XVIII, 1963, 4th Session, P. 13152-54).

20. The Fifteenth Amendment, in fact, clarified the legal position under the existing law by requiring that opportunity must be given to the delinquent Government servant not only at the first stage to be heard in respect of the charges but also at the second stage i. e. after the disciplinary authority had come to a tentative conclusion of guilt at the conclusion of the inquiry and had decided upon the punishment proposed to be inflicted. It was a necessary and sufficient safeguard against arbitrary and excessive executive action written into the Constitution. Unfortunately, now the Forty-Second Amendment has achieved what the Fifteenth Amendment could not. By the constitutional amendment the Government be taken away the essential constitutional safeguard.

21. It is a fundamental rule of law that no decision must be taken which will affect the rights of any person without first giving him an opportunity of putting forward his case. Both the Privy Council as well as this Court have in a series of cases required strict adhe-

rence to the rules of natural justice where a public authority or body has to deal with rights. Unfortunately the first proviso to cl. (2) of Art. 311 has eliminated the rule audi alteram partem at the second stage i. e. observance of the rules of natural justice and the requirement of a reasonable opportunity of making representation on the proposed action. The question still remain as to the state when the delinquent Government servant would get the opportunity of showing cause against the action taken against him. Where does he get an opportunity to exonerate himself from the charge unless he is allowed to show that the evidence adduced at the inquiry is not worthy of credence or consideration? Does he ever get a right to show that he has not been guilty of any misconduct so as to deserve any punishment, or that the charges proved against him are not of such a character as to merit the extreme penalty of dismissal or even of removal or reduction in rank and that any of the lesser punishment ought to have been sufficient in his case? But we are bound by the majority decision in *Tulsiram Patel's* case.

22. After the constitutional change brought about it seems that the only stage at which now a civil servant can exercise this valuable right is by enforcing his remedy by way of a departmental appeal or revision, or by way of judicial review. In *Tulsiram Patel's* case (AIR 1985 SC 1416), the majority decision has pointed out that even after the Forty-Second. Amendment, the inquiry required by cl. (2) of Art. 311



would be the same except that it would not be necessary to give to a civil servant an opportunity to make representation with respect to the penalty proposed to be imposed on him. In such a case, a civil servant who has been dismissed, removed or reduced in rank by applying to his case one of the clauses of the second proviso to Art. 311 (2) or the analogous Service Rule has two remedies available to him. These remedies are: (i) the appropriate departmental appeal provided for in the relevant Service Rules, and (ii) if still dissatisfied, invoking the Court's power of judicial review. In *Satyavir Singh v. Union of India* (1985) 4 SCC 252 : (AIR 1986 SC 555) there is an attempt made to analyse the rationes decidendi of the majority decision in *Tulsiram Patel's Case* and the nature of the remedies left to the civil servant (of SCC) of the report. If that be so, in a case governed by one of the clauses of the second proviso to Art. 311 (2) or an analogous Service Rule, there is still all the more reason that in cases not governed by the second proviso, a civil servant subjected to disciplinary punishment of dismissal, removal or reduction in rank under cl. (2) of Art. 311 would have these remedies left to him. Virtually this is tantamount to a post-decisional hearing.

23. There has been considerable fluctuation of judicial opinion in England as to whether a right of appeal is really a substitute for the insistence upon the requirement of a fair hearing

or the observance of natural justice which implies "the duty to act judicially". Natural justice does not require that there should be a right of appeal from any decision. This is an inevitable corollary of the fact that there is no right of appeal against a statutory authority unless the statute so provides, Professor H. W. R. Wade in his *Administrative Law*, 5th edn., observes:

"Whether a hearing given on appeal is an acceptable substitute for a hearing not given, or not properly given, before the initial decision is in some cases an arguable question. In principle there ought to be an observance of natural justice equally at both stages.....If natural justice is violated at the first stage, the right of appeal is not so much a true right of appeal as a corrected initial hearing: instead of fair trial followed by appeal, the procedure is reduced to unfair trial followed by fair trial."

After referring to Megarry, J.'s dictum in a trade union expulsion case holding that, as a general rule, a failure of natural justice in the trial body cannot be cured by a sufficiency of natural justice in the appellate body, the learned author observes:

"Nevertheless it is always possible that some statutory scheme may imply that the 'appeal' is to be the only hearing necessary."

24. Professor de Smith refers to the recent greater readiness of the Court to find a breach of natural justice 'cured' by a subse-



port No. 28, p. 13

**A. P. Sen**

**Judge**

**Supreme Court of India**

ent hearing before an appellate tribu-  
 . In *Swadeshi Cotton Mills v.*  
*Union of India*, (1981) 2 SCR 533  
 though the Majority held that the  
 expression "that immediate action is  
 necessary" in S. 18AA (1)(a) of the  
*Industries (Development and Regula-*  
*tion) Act, 1951*, does not exclude ab-  
 solutely, by necessary implication, the  
 application of *audi alteram partem*.  
 e, Chinnappa Reddy, J. dissented  
 with the view and expressed that the  
 expression 'immediate action may in  
 certain situations mean exclusion of  
 the application of the rules of natural  
 justice and a post decisional hearing  
 provided by the statute itself may be a  
 sufficient substitute. It is not necessary  
 for our purposes to go into the vexed  
 question whether a post decisional hear-  
 ing is a substitute of the denial of a  
 right of hearing at the initial stage or  
 the observance of the rules of natural  
 justice since the majority in *Tulsiram*  
*Patel's case* (AIR 1985 SC 1416) un-  
 equivocally lays down that only stage  
 at which a Government servant gets  
 a reasonable opportunity of showing  
 cause against the action proposed to  
 be taken in regard to him' i. e. an  
 opportunity to exonerate himself from  
 the charge by showing that the evi-  
 dence adduced at the inquiry is not  
 worthy of credence or consideration  
 so that the charges proved against him  
 are not of such a character as to  
 merit the extreme penalty of dismis-  
 sal or removal or reduction in rank  
 and that any of the lesser punishments  
 might to have been sufficient in his  
 case, is at the stage of hearing of a  
 departmental appeal. Such being the

legal position, it is of utmost impor-  
 tance after the Forty-Second Amend-  
 ment as interpreted by the majority  
 in *Tulsiram Patel's case* that the Ap-  
 pellate Authority must not only give a  
 hearing to the Government servant con-  
 cerned but also pass a reasoned order dea-  
 ling with the contentions raised by him  
 in the appeal. We wish to emphasize  
 that reasoned decisions by tribunals,  
 such as the Railway Board in the pre-  
 sent case, will promote public confi-  
 dence in the administrative process.  
 An objective consideration is possible  
 only if the delinquent servant is heard  
 and given a chance to satisfy the Autho-  
 rity regarding the final orders that  
 may be passed on his appeal. Consi-  
 derations of fair-play and justice also  
 require that such a personal hearing  
 should be given.

25. In the result, the appeal must  
 succeed and is allowed. The judgement  
 and order of a learned single Judge  
 of the Delhi High Court dated August  
 16, 1983 and that of the Division  
 Bench dismissing the Letters Patent Ap-  
 peal filed by the appellant in limine  
 by its order dated Feb. 15, 1984 are both  
 set aside, so also the impugned order  
 of the Railway Board dated March  
 11, 1972. We direct the Railway  
 Board to hear and dispose of the appeal  
 after affording a personal hearing to the  
 appellant on merits by a reasoned order  
 in conformity with the requirements of  
 R. 22 (2) of the *Railway Servants*  
*(Discipline & Appeal) Rules, 1968*, as  
 expeditiously as possible, and in any  
 event, not later than four months from  
 today.

Appeal allowed.



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**O. Chinnappa Reddy**  
**Judge**  
**Supreme Court of India**

### OBSERVATION

**Constitution of India, Arts. 309 Proviso, 311 Punjab Government National Emergency (Concessions) Rules (1965) Rr. 4 (ii) 2 - Seniority - Determination - Ev-army personnel—Military service rendered by him during period of emergency only could be taken into account and not entire military service—Military service rendered subsequent to lifting of emergency could not be taken into account for reckoning seniority in civil post.**

### OBSERVED BY

**Mr. O. Chinnappa Reddy and Mr. v. Balakrishna Eradi**  
**Hon'ble Judges, Supreme Court of India.**

### IN

**Review Petitions Nos. 107, 107-A & 107-B of 1986 decided on 10-4-1986 in the case of Ex-Capt. A. S. Parmar and others, Appellants v. State of Haryana and others, Respondents.**

### TEXT

**O. Chinnappa Reddy, J. :—**These petitions have been filed by the State of Haryana to review an order made by the Punjab Government in CMP Nos. 37521 of 1984 and 24308 of 1985 in Civil Appeals Nos. 3095-96 of 1980 and Writ Petition No. 8328 of 1981. Ex-Captain A. S. Parmar & others were the appellants in Civil Appeals Nos. 3095-96 of 1980 and Hawa Singh Dhillon was the petitioner in Writ Petition No. 8328 of 1981. These civil appeals and writ petitions along with some other civil appeals and writ petitions were disposed of by a judgement pronounced by the Punjab Government on April 26, 1985 : (reported in 1984 Lab IC 1015). The grievance of the appellants and the petitioners herein was that by an amendment of the Punjab National Emergency (Concessions) Rules, 1965 made in 1976,

certain benefits which had been given to persons, who had volunteered for military service during the external emergency had been illegally taken away. This court granted the following relief :

“The impugned Rule 4 (ii) of the Punjab Government National Emergency (Concessions) Rules, 1965, as amended by the Haryana Government Gazette Notification No. GSR-77/Const/Art. 309/Amend/(1)/76 dated March 22, 1976 and the Notification No. GSR-182/Const/Art. 309/Amend/ (2)/76 dated August 9, 1976 amending the definition of the expression ‘military service’ in Rule 2, are declared to be ultra vires the Constitution in so far as they affect prejudicially persons who had acquired rights as stated above. A writ in the nature of man-



damus is issued directing respondents 1 and 2 to prepare the seniority list afresh in the light of the decision of this Court taking into consideration the military service rendered by the petitioners as well as the appellants."

Alleging that the State of Haryana was not implementing the judgement of the court, the appellants in Civil Appeals Nos. 3095, 96 of 1980 and the petitioners in writ petition No. 8328 of 1981 filed petitions praying that the court may proceed against the State of Haryana for contempt of court. On July 29, 1985, an order was made by this court directing the respondents to give credit of the 'entire military service' of the petitioners in reckoning their seniority and to give them all benefits accruing thereon. The order was directed to be carried out within three months from that day. The State of Haryana has filed the present applications for reviewing our order. It is pointed out that under the rules, both prior to and after the 1976 amendment, the service for which credit could be given to ex-army personnel was the service during the period of emergency only and not any period of service subsequent to the lifting of the emergency on January 10, 1968. The submission of the State of Haryana appears to be correct. Rule 4(ii) of the Punjab National Emergency (Concession) Rules, 1965 before it was amended in 1976 said, "the period of military service mentioned in clause (i) shall be taken into consideration for the purpose of determining the

seniority of a person who has rendered military service." Military service defined by Rule 2 as follows :

"For the purposes of these rules the expression 'military service' means service as an enlisted soldier or as an enrolled or commissioned service in any of the three wings of the Indian Armed Forces (including service as a Warrant Officer) rendered by a person during the period of operation of the proclamation of emergency made by the President under Article 352 of the Constitution of India on October 26, 1962 or such other service as may hereafter be declared as military service for the purpose of these rules. Any period of military training followed by military service shall also be reckoned as military service."

The words emphasised by us clearly show that it is only the service rendered during the period of emergency that could be taken into account and not any other period. No doubt there is a provision for other service also being declared as military service, but only on the order of the Government making such declaration has been brought to our notice. Shri Shanti Bhushan, learned counsel for the respondents, argued that earlier the Government themselves had counted the entire military service as service for the purpose of reckoning seniority but it was only after the 1976 amendment that the Government went back upon the rule which they were hitherto following and refused to give credit to service rendered after the lifting of the emergency. He invited our attention to the principal judgement



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**O. Chinnappa Reddy**  
**Judge**  
**Supreme Court of India**

d April 26, 1984 : (reported in 1984 IC 1015) and urged that the judge-  
 t also proceeded on the basis that  
 as the 1976 amendment that pur-  
 ted to bring about a change. Though  
 doubt, as urged by Shri Shanti  
 shan, the judgement appears to pro-  
 d as if the change was brought about  
 1976 even in regard to the length of  
 tary service to be taken into acco-  
 , that question was not actually  
 ided. On the other hand in *Randhir*  
*gh Dhull v. Bhambri* (1981) 2 SCC  
 referring to Rule 2, it was expressly  
 ed by this court that concession in  
 ard to seniority was admissible in  
 ect of the military service rendered  
 ing the operation of Emergency only  
 not for any military service after  
 termination of the Emergency.  
 i Shanti Bhushan invited our atten-  
 n to a circular of the Government  
 which it was said that the period of

approved military service will count  
 for increments, seniority and pension  
 in the civil employment. But para 4  
 of the very circular makes it clear that  
 the concessions will apply in the case  
 of all persons, who have joined or join  
 military service during the Emergency  
 and will be in respect of approved  
 military service rendered during the  
 emergency and for such period there-  
 after as the Government may prescribe.  
 It is, therefore, clear that military ser-  
 vice rendered subsequent to the lifting  
 to emergency cannot be taken into  
 account for the purpose of reckoning  
 the seniority in the civil post. We, there-  
 fore, review our order dated July 29,  
 1985 and direct that credit will be for  
 the military service rendered up to the  
 date of the lifting of emergency only  
 and not the entire military service.

Petition allowed.



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## OBSERVATION

**Constitution of India, Arts. 311, 14—Gratuity—Provision for payment of larger amount with prospective effect from specified date Does not offend Art. 14.**

## OBSERVED BY

Mr. M. P. Thakkar And Mr. B. C. Ray  
Hon'ble Judges, Supreme Court of India.

## IN

Special Leave Petition (Civil) Nos. 14179-80 of 1985, decided 25-7-1986, in the case State Government Pensioners Association and others, Petitioners v. State of Andhra Pradesh, Respondent.

## TEXT

Thakkar, J. :— Does that part of the provision which provides for payment of larger amount of gratuity with prospective effect from the specified date offend Art. 14 of the Constitution of India? Whether gratuity must be paid on the specified basis, to all those who have retired before the date of the upward revision, with retrospective effect, even if the provision provides for prospective operation, in order not to offend Art. 14 of the Constitution of India? A Division Bench of the High Court of Andhra Pradesh says 'no'. In our opinion it rightly says so. The petitioners erstwhile government employees who had retired before April 1, 1978 inter alia claimed and contended before the High Court that they were entitled to the benefit of Government order No. 88 dated 26th March, 1980 providing that :

“(b) Retirement gratuity may be paid of pay drawn at the time of retire-

ment for every 6 monthly service subject to maximum of 20 months pay limited to Rs. 30,000/-.”

The said order in so far as gratuity is concerned is made effective from 1st April, 1978 Says the High Court :—

“Therefore, we are now only concerned whether this G. O. Ms. No. 88 dated 26-3-1980, should be made applicable to the pensioners that retired prior to 1-4-1978 by revising their gratuity payable to them. The learned Advocate-General, contends that gratuity is something different from the other pensionary benefits like the pension and the family pension, which are continuing ones. The Gratuity that accrued to the petitioners prior to 1-4-1978 was calculated on the then existing Rules and paid. In that way, the pensioners retired prior to 1-4-1978 will form themselves into a distinct class for purposes of the payment of benefit of gratuity from the others



that retired after 1-4-1978, from which date, the revised pension rules are made to be applied by the Government. On the other hand, it is the contention of the writ petitioners that gratuity is a part and parcel of the pensionary benefits and the same cannot be looked at separately from the other pensionary reliefs. The learned counsel for the Writ Petitioners, no doubt, cited two decisions *V.P. Gautama, IAS Retd. v. Union of India*, (1983) 2 Serv LR 346 : (1984 Lad IC 154) (Punjab & Har.) and *M. P. Tandon v. State of U.P.* 1984 Lab IC 677 (All), where their Lordships that decided the above two cases, held, that no distinction can be made in the pensionary benefits including death-cum-retirement gratuity benefit between the pensioners that retired prior to the stipulated date and after the stipulated date.

In the decision *D. S. Nakara v. Union of India*, AIR 1983 SC 130, their Lordships of the Supreme Court enunciated the principle as follows :

With the expanding horizons of socio-economic justice, the Socialist Republic and Welfare State which the country endeavours to set up and the fact that the old men who retired when emoluments were comparatively low are exposed to vagaries of continuously rising prices, the falling value of the rupee consequent upon inflationary inputs, by introducing an arbitrary eligibility criterion, 'being in service and retiring subsequent to the specified date' for being in service and retiring subsequent to the specified date' for being eligible for the liberalised pension scheme and there-

by dividing a homogeneous class, the classification being not based on any discernible rational principle and being wholly unrelated to the objects sought to be achieved by grant of liberalised pension and the eligibility criteria devised being thoroughly arbitrary, the eligibility for liberalised pension scheme of "being in service on the specified date and retiring subsequent to that date" in the memoranda Exs. P 1 and P 2, violated Art. 14 and is unconstitutional and liable to be struck down".

After thus enunciating the principle their Lordships have taken care to observe as follows :—

"But we make it abundantly clear that arrears are not required to be made because to that extent the scheme is prospective."

In our opinion, the arrears relating to gratuity benefit computed according to the Revised Pension Rules of 1980 may not be paid to the pensioners that retired prior to 1-4-1978 because at the time of retirement they were governed by the then existing Rules and their gratuity was calculated on that basis. The same was paid. Since the revised scheme is operative from the date mentioned in the scheme, i. e. 1-4-1978, the continuing rights of the pensioners to receive pension and family pension must also be revised according to that scheme. But the same cannot be said with regard to gratuity, which was accrued and drawn. The reason why their Lordships of the Supreme Court in *Nakarara's case* (AIR



**M. P. Thakkar**  
**Judge**  
**Supreme Court of India**

SC 130) refused to grant arrears to pensioners that retired prior to the stipulated date would ipso facto apply by refusing to grant the revised gratuity, since that would amount to requiring the State Government to Pay arrears relating to gratuity after awarding them according to the new scheme for those that retired prior to 1-4-1978 and that would amount to giving retrospective effect to the A. P. Revised Pension Rules, 1980, which came into effect from 29-10-1979 and the case of Part II of those Rules from 1-4-1978. The scheme is prospective and not retrospective.

Moreover, we must remember that when the State Government appointed a Pay Revision Commissioner to review the then existing scales of pay under G.O. Ms. No. 745, General Administration (Spl A) Department, dated 3-11-1978, the Pay Revision Commissioner was asked to take into account, while making his recommendation, the economic conditions in the State, the financial implications of his recommendations, and the impact of the plan and other essential non-plan expenditure. Surely, he as a Pay Revision Commissioner, when he made his recommendations to revise pensionary benefits, is not contemplating to make his recommendations retrospective. Otherwise, he would have taken financial implications of his recommendations and the impact of the plan and other essential non-plan ex-

penditure of the State. For this reason also, we cannot direct the State Government to revise the gratuity benefit, which was already paid to these petitioners who retired prior to 1-4-1978. The Supreme Court has clearly stated in Nakara's case that arrears are not required to be paid because to that extent the scheme is prospective. Similar is the case with regard to the case of gratuity that was accrued and paid prior to the stipulated day mentioned in the G. O. promulgating the Revised Pension Rules of 1980."

2. We fully concur with the view of the High Court. The upward revision of gratuity takes effect from the specified date (April 1, 1979) with prospective effect. The High Court has rightly understood and correctly applied the principle propounded by this Court in Nakara's case AIR 1983 SC 130. There is no illegality or unconstitutionality (from the platform of Article 14 of the Constitution of India) involved in providing for prospective operation from the specified date. Even if that part of the Notification which provides for enforcement with effect from the specified date is struck down the provision can but have prospective operation-not retrospective operation. In that event (if the specified date line is effaced), it will operate only prospectively with effect from the date of issuance of the notification since it does not retrospectively apply to all those who have already retired before the said date. In order to make it retrospective so that it applies



to all those who retired after the commencement of the Constitution on 26th January, 1950 and before the date of issuance of the notification on 26th March, 1980, the Court will have to re-write the notification and introduce a provision to this effect saying in express terms that it shall operate retrospectively. Merely striking down (or effacing) the alleged offending portion whereby it is made effective from the specified date will not do. And this, the Court cannot do. Besides, giving prospective operation to such payments cannot by any stretch of imagination be condemned as offending Art. 14. An illustration will make it clear. Improvements in pay scale by the very nature of things can be made prospectively so as to apply to only those who are in the employment on the date of the upward revision. Those who were in employment say in 1950, 1960 or 1970, lived, spent, and saved, on the basis of the then prevailing cost of living structure and pay-scale structure, cannot invoke Art. 14 in order to claim the higher pay-scale brought into force say, in 1980. If upward pay revision cannot be made prospectively on account of Art. 14, perhaps no such revision would ever be made. Similar is the case with regard to gratuity which has already been paid to the petitioners on the then prevailing basis as it obtained at the time of their respective dates of retirement. The amount got crystalized on the date of retirement on the basis of the salary drawn by him on the

date of retirement. And it was already paid to them on that footing. The transaction is completed and closed. There is no scope for upward or downward revision in the context of upward or downward revision of the formula evolved later on in future unless the provision in this behalf expressly so provides retrospectively (downward revision may not be legally permissible even). It would be futile to contend that no upward revision of gratuity amount can be made in harmony with Art. 14 unless it also provides for payment on the revised basis to all those who have already retired between the date of commencement of the Constitution in 1950 and the date of upward revision. There is therefore no escape from the conclusion that the High Court was perfectly right in repelling the petitioners' plea in this behalf. For the sake of record we may mention that our attention was called to an order of a Division Bench of the High Court of Gujarat LPA 280 of 1983 dated 8-9-83 per P. D. Desai Acting C. J. which does not discuss the issues involved but is based on a concession said to have been made by the Advocate-General who appeared for the State. And also to a decision of the Allahabad High Court *M. P. Tandon v. State of U. P.* 1984 Lab IC 677 and Punjab and Haryana High Court *V. P. Gautama v. Union of India*, (1984) 1 Sery LJ. 120. In none of these decisions the relevant passage from *Nakara's* case (AIR 1983 S. C. 130) was considered. Nor was the aspect regarding prospec-



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**M. P. Thakkar**

**Judge**

**Supreme Court of India**

operation considered on principle. High Court considered it shocking was carried away by the fact that employee who retired even one day before the enforcement of the upward revision would not get the benefit if the fixed date of enforcement was not effected by striking down the relevant provision. But in all cases of prospective operation it would be so. Just as one who files a suit even one day after expiry of limitation would lose his

right to sue, one who retires even a day prior to enforcement of the upward revision would not get the benefit. This cannot be helped, there is nothing shocking in it unless one can say legislation can never be made prospective, and nothing turns on it. These are the reasons which impelled us to dismiss the Special Leave Petition on 18th July, 1986.

Order accordingly.



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**A. P. Sen**  
**Judge**  
**Supreme Court of India**

### OBSERVATION

**Constitution of India, Art. 32—Writ petition—Allotment of Maruti Vehicles of manufactures' quota of five per cent—Guidelines regulating such allotment laid down by Supreme Court.**

### OBSERVED BY

**Mr. V. D. Tulzapurkar and Mr. A. P. Sen,**  
**Hon'ble Judges, Supreme Court of India.**

### IN

**Writ Petn. (Civil) Nos. 588 and 11716 of 1984, decided on 7-3-1986, between**  
**Shri K. K. Kumar Mittal, Petitioner v. Maruti Udyog Ltd. and another, Respondents.**

**With**

**VOICE (Voluntary Organisation in the Interest of Consumers Education) and**  
**another, Petitioners v. Maruti Udyog Ltd. and another, Respondents.**

### TEXT

**ORDER :—**We have heard Mr. Soli J. Shrinani, Mr. Prashant Bhushan and Mr. R. Karanjawala for the petitioners and the learned Attorney-General on behalf of the respondents. Various submissions were made on behalf of the parties. After considerable discussion of the various proposals and suggestions made by the parties and after having given anxious and deep consideration to the matter it is ordered that in public interest the following guidelines should regulate the allotment of Maruti Vehicles of the manufacturers' quota of 5 per cent.

2. The allotment of Maruti vehicles of the manufacturers' quota of five per cent will be made in favour of the following categories only.

I Any organisation/institution

coming within the definition of 'State' under Art. 12 of the Constitution of India.

II Any hospital or recognised charitable organisation or educational institutions registered or incorporated under a statute or having recognition under S. 80 G of the Income-tax Act, 1961.

III Individuals.

(a) An individual suffering from physical handicap so as to render him incapable of using public transport would be eligible for allotment provided his income together with the income of his or her spouse or his or her guardian does not exceed Rs. 60,000/- per year.

(b) The President of India, Vice-President of India, Cabinet Ministers,



Ministers of State in the Union Cabinet and Governors of States and Cabinet Ministers in State Governments, the Chairman of the Public Service Commission, the Chief Election Commissioner, the Auditor and Comptroller General of India and the Attorney General of India.

(c) The Speaker and the Deputy Speaker of the Lok Sabha, the Chairman and the Deputy Chairman of the Rajya Sabha, Speakers of State Legislative Assemblies, Chair persons of State Legislative Councils, and Leaders of Opposition parties in Parliament and in the State Legislatures.

(d) The Chief Justice and other Judges of Supreme Court and the Chief Justice and other Judges of the High Courts.

(e) Public servants not below the rank of Additional Secretary to the Government of India.

(f) Serving members of the Armed Forces not below the rank of Brigadier in the Army or equivalent rank in the Navy or the Air Force :

(g) Manufactures of component parts for utilisation in the manufacture of Maruti vehicles. The number of this category will be restricted to ten per years;

(h) Employees of Maruti Udyog Ltd., limited to fifty vehicles par year;

(i) Individuals in recognition of their outstanding humanitarian services to the society or to the Nation. The number in this category will be restricted to ten per year;

(j) Individual cases of undue hardship on humanitarian grounds. The number in this category will be restricted to five years.

IV. Error category i.e. individuals whose applications for regular allotment could not be registered on account of genuine error.

3. The following conditions will be strictly observed in the allotment of vehicles to any organisation/institution; person or individual in any of the aforesaid categories :

(a) There will be no resale of the vehicle by the allottee for a period of three years.

This condition will be inserted in the order of allotment issued in favour of the allottee. Maruti Udyog Ltd. will further obtain before giving delivery of the vehicle a written undertaking from the allottee that he will not sell the vehicle for a period of three years from the date of delivery.

(b) There will be no second allotment out of the manufacturers' quota to the same individual.

(c) In each of the aforesaid categories of allotment, as far as possible will be made on first come first served basis in accordance with the date of the receipt of application for allotment out of the aforesaid manufactures' quota. In cases where more than one application is received on the same day from individuals in the same category priority for allotment in such cases will be determined by draw of lots under proper supervision.



**A. P. Sen**  
**Judge**  
**Supreme Court of India**

4 It is clarified that allotments made for military/paramilitary purposes against firm export orders for supplies outside of India, will not be included within 5% of the Manufacturers' quota.

5. These guidelines will be in force for a period of three years and will be subject to review taking circumstances which may exist at the point of time.

6. In view of the aforesaid guidelines,

we think, it is unnecessary for us to determine the various submissions and contentions raised on behalf of the parties which are however left open.

7. All general interim orders are vacated. However, deliveries made pursuant to our interim orders will stand.

8. Liberty to apply :

Order accordingly.



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## OBSERVATION

**Transfer of Government Servant—Transfer is an incident of service—Order of transfer not resulting in alteration of any condition of service to his disadvantage—Order is not appealable to State Government under R. 19 ILR (1986) 2135 Affirmed; (1985) 2 Lab LJ 73 (Bom)—(Constitution of India, Art 309 proviso) Karnataka Civil Services (Classification, control and Appeal) Rules 1977, Rr. 19, 18.**

## OBSERVED BY

Mr. A. P. Sen and Mr. B. C. Ray

Hon'ble Judges, Supreme Court of India

## IN

Spl. Leave Petn. (Civil) No. 7904 of 1986, decided on 26-8-1986 in the case of Varadha Rao, Petitioner v. State of Karnataka and others, Respondents.

## TEXT

**ORDER :—**The short point involved in this special leave petition is whether the order of transfer of a Government servant made by an authority other than the Government itself, is appealable before the Government under R. 19 of the Karnataka Civil Services (Classification, Control and Appeal) Rules, 1957. There was a divergence of opinion in the High Court on the question as to the maintainability of such appeals. In a series of writ petitions, Rama Jois, J. took the view that 'transfer' is a condition of service and therefore the Government servant has a right of appeal against the order of transfer under R. 19. Dodda Kalegouda, J., on the other hand, dismissed the writ petition filed by the petitioner holding that no appeal lay to the State Government against an order of transfer made by the Commissioner of

Labour transferring him from Bangalore to Tarikere under R. 19 of the Rules. A number of appeals by the Government as well as the civil servants against the orders passed by the learned Judges were heard together by a Division Bench. The learned Judges have upheld the view of Dodda Kalegouda, J.

We have heard B. Varadha Rao, Senior Labour Inspector in the Department of Labour, Government of Karnataka in person. We find no reason to interfere with the view expressed by the Division Bench. As the learned Judges point out, the answer to the question turns on whether an order of 'transfer' varies to the disadvantage of a Government servant, any of his conditions of service 'attracting the right of appeal under R. 19(1) (a) of the Rules'. Rule 19 of the Rules



read as follows :

“19. Appeal against the order—

(1) Every member of any of the Services mentioned in Rule 5 shall be entitled to appeal to Government against the order passed by a subordinate authority which—

(a) denies or varies to his disadvantage his pay, allowances pension or other conditions of services as regulated by any order, rules or by agreement, or

(b) interprets to his disadvantage the provisions of any such order' rules or agreement where by his pay, allowances, pension or other conditions of services as regulated by any order, rules or by agreement.

3. Part IV enumerates the nature of penalties which can be imposed on a Government servant R. 17 specifies the orders against which no appeal is provided from an order passed by an authority imposing any of the penalties specified in R. 8. R. 8 specifies the nature of penalties that may be imposed on the Government servants, such as :

- (i) fine ;
- (ii) censure ;
- (iii) withholding of increments ;
- (iii-a) withholding of promotion ;
- (iv) recovery from pay of the whole or part of any pecuniary loss caused ;
- (iv-a) reduction to a lower stage in the time-scale of pay for spe-

cified period with further directions ;

- (v) reduction to a lower time-scale of pay ;
- (vi) compulsory retirement ;
- (vii) removal from service which shall not be a disqualification for future employment and
- (viii) dismissal from service.

4. The learned Judges observe that these penalties can be imposed on a Government servant where disciplinary proceeding are initiated against him under the Rules by the competent authority. They further observe that R. 19 of the Rules therefore provides for appeals against orders imposing penalties referred to and specified in R. 8, and add :

“If an order of transfer does not amount to an order of penalty or any other order' falling within R. 19, such an order does not attract and is not appealable either under R. 18 or Rule 19”.

We agree with the view expressed by the learned Judges that transfer is always understood and construed as an incident of service. The words 'other conditions of service' in just apposition to the preceding words 'denies or varies to his disadvantage his pay, allowances, pension' in R. 19 (1) (a) must be construed ejusdem generis. Any alteration in the conditions of service must result in prejudice to the Government servant and some disadvantage touching his pay, allowances, pension



city, promotion, leave, etc. It is understood that transfer of a Government servant who is appointed to a particular cadre of transferable posts from one place to another is an ordinary incident of service and therefore does not result in any alteration of the conditions of service to his disadvantage. That a Government servant is liable to be transferred to a similar post in the same cadre is a normal feature and incident of Government service and on Government service and no Government servant has a claim to remain in a particular place in a particular post unless, of course, his appointment itself is to a specified, non-transferable post. As the learned judges rightly observe :

“The norms enunciated by Government for the guidance of its officers in the matter of regulating transfers are in the nature of guidelines to the officers who order transfers in the exigencies of administration than vesting of immunity from transfer in the Government servants.”

5. It is no doubt true that if the power of transfer is abused, the exercise of the power is vitiated. But it is one thing to say that an order of transfer which is not made in public interest but for collateral purposes or with oblique motives is vitiated by abuse of powers, and an altogether different thing to say that such an order per se made in the exigencies of service varies any condition of service, express or implied, to the disadvantage of the concerned Government

servant. The petitioner who appeared in person placed reliance, as he did in the High Court, on the decision of the Bombay High Court in *Sheshrao Nagorao Umap v. State of Maharashtra*, (1985) 2 Lab LJ 73. We do not see how the decision can be of any avail to the question at issue. The learned Judge were dealing with a petition under Art. 226 of the Constitution by which a Medical Officer challenged his order of transfer on the ground that it was not only mala fide but was issued in colourable exercise of power and therefore wholly illegal and void. It was contended by the petitioner that he was being transferred contrary to the Government policy with a view to accommodate one Dr. R.P. Patil because of the political influence he wielded. In allowing the writ petition, the learned Judges observed that it was no doubt true that the Government has power to transfer its employees employed in a transferable post but this power has to be exercised bona fide to meet the exigencies of the administration. If the power is exercised mala fide, then obviously the order of transfer is liable to be struck down. They relied on the observations made by this Court in *E. P. Royappa v. State of Tamil Nadu*, (1974) 2 SCR 348 for the positivistic view that equality is antithetic to arbitrariness and held that the observations equally apply to the policy regarding the transfer of public servants. It was observed :

“It is an accepted principle that in public service transfer is an incident



of service. It is also an implied condition of service and appointing authority has a wide discretion in the matter. The Government is the best judge to decide how to distribute and utilise the services of its employees. However this power must be exercised honestly, bona fide and reasonably. It should be exercised in public interest. If the exercise of power is based on extraneous considerations or for achieving an alien purpose or an oblique motive it would amount to mala fide and colourable exercise of power. Frequent transfers, without sufficient reasons to justify such transfers, cannot but be held as mala fide. A transfer is mala fide when it is made not for professed purpose, such as in normal course or in public or administrative interest or in the exigencies of service but for other purpose than is to accommodate another person for undisclosed reasons. It is the basic principle of rule of law and good administration, that even administrative actions should be just and fair".

The observation that transfer is also an implied condition of service is just an observation in passing. It certainly cannot be relied upon in support of the contention that an order of transfer ipso facto varies to the disadvantage of a Government servant, any of his conditions of service making the impugned order appealable under R.

19 (1) (a) of the Rules.

6. One cannot but deprecate the frequent unscheduled and unreasonable transfers can uproot a family, cause irreparable harm to a Government servant and drive him to desperation. It disrupts the education of his children and leads to numerous other complications and problems and results in hardship and demoralisation. It therefore follows that the policy of transfer should be reasonable and fair and should apply to everybody equally. But, at the same time, it cannot be forgotten that so far as superior or more responsible posts are concerned, continuous posting at one station or in one department of the Government is not conducive to good administration. It creates a vested interest and therefore we find that even from the British times the general policy has been to restrict the period of posting for a definite period. We wish to add that the position of Class III and Class IV employees stands on a different footing. We trust that the Government will keep these considerations in view while making an order of transfer.

7. The special leave petition is accordingly dismissed. The petitioner is given four months time to join his new place of posting.

Petition dismissed



**E. S. Venkataramiah**  
**Judge**  
**Supreme Court of India**

### OBSERVATION

**Dismissal** -- During the pendency of the departmental proceedings, servant  
ed on invalid pension before he had attained the age of retirement Sub-  
ent order of Govt. dismissing him from service after revoking the earlier  
e would be un sustainable --Bihar Pension Rules, R. 116 --Constitution of  
e, Arts. 309, Proviso and 311 (2).

### OBSERVED BY

Mr. E. S. Venkataramiah and Mr. T. Balakrishna Eradi  
Hon'ble Judges, Supreme Court of India

### IN

Civil Appeal No. 683 of 1971 decided on 16-7-1986 in the case of the Kirti Bhusan  
, Appellant v. State of Bihar and others, Respondents.

### TEXT

Venkataramiah, J.:—This appeal  
ertificate is filed against the judge-  
of the High Court of Patna in Civil  
Jurisdiction Case No. 444 of 1967  
ered on April 3, 1969 (reported in  
Lab. IC 950).

2. The appellant was employed as  
rk in the Excise Department of the  
of Bihar at Hazaribagh. In a dis-  
ary proceeding instituted against  
17 charges were framed against  
During the enquiry he has been  
under suspension. The Inquiring  
ers however found only six of  
established and accordingly a re-  
was submitted by him on Novem-  
9, 1960. On the 8th of Septem-  
1961 the appellant was asked by  
Excise Commissioner, who was the  
iplinary Authority, to show cause  
he should not be removed from  
ce. The appellant submitted his

reply to the said notice on November  
1, 1961 showing cause against the  
proposed action. After the submission  
of the report by the Inquiring Officer  
the civil surgeon of the area issued a  
certificate to the effect that the appe-  
llant was an invalid and he could not  
discharge his duties properly in that  
state of health. On January 31, 1962  
an order was passed by the Excise  
Commissioner directing the retirement  
of the appellant on invalid pension  
under rule 116 of the Bihar Pension  
Rules with effect from July 19, 1961.  
Thus he ceased to be a Government  
employee. Nearly one year and nine  
months after the date of retirement of  
the appellant on October 5, 1963 the  
Government of Bihar revoked the or-  
der of retirement and the relevant part  
of its communication read thus :

“I am to invite a reference to this  
department memo. No. 869 dated



31-1-62 with which the order of the Excise Commissioner was conveyed to you allowing Excise, Clerk, Shri Kirti Bhushan Singh (under suspension) to retire on invalid pension with effect from 19-7-61 under rule 116 of Bihar Pension Rules."

"The said order has been re-examined by Govt. in the light of Rule 73 (f) of the Bihar Service Code, and it has been found that since departmental proceedings were pending against the Excise Clerk it was irregular to permit him to retire on invalid pension. Govt. have, therefore, decided to revoke the order of the Excise Commr. contained in his memo No. 869 dated 31-1-62. As a result the Excise Clerk should be deemed to be continuing under suspension and that he would be entitled to subsistence allowances as may be admissible to him under the Rules till final orders are passed on the proceedings which were pending against him at the time the said memo was issued."

3. Thereafter the Excise Commissioner passed an order on November 1, 1963 dismissing the appellant from service. The appellant questioned the order of dismissal in the writ petition before the High Court out of which this appeal arises.

4. In the High Court the appellant contended that after he had been retired from service by the order dated January 31, 1962 with effect from July 19, 1961 it was not permissible to the State Government to revoke the order

of retirement by its order dated October 5, 1963 and to the Excise Commissioner to pass an order of dismissal from service thereafter on November 1, 1963. On behalf of the State Government it was contended that it was open to the State Government under rule 73 (E) of the Bihar Service Code to revoke the order of the Excise Commissioner regarding the appellant on invalid pension and therefore the order of dismissal passed subsequently was a valid order. The High Court accepting the contention urged on behalf of the State Government dismissed the writ petition.

5. In this appeal the appellant has questioned the correctness of the judgment of the High Court. In this case the facts are not in dispute. By January 31, 1962 the reply to the show cause notice had already been submitted by the appellant. The Excise Commissioner had also before him the medical certificate of the Civil Surgeon. At that stage two courses were open to the Excise Commissioner. He could have either dismissed the appellant if he felt that the charges had been established or he could have ordered his retirement on invalid pension under rule 116 of the Bihar Pension Rules. The Excise Commissioner however, passed an order directing the retirement of the appellant on January 31, 1962 with effect from July 19, 1961. Thus the appellant ceased to be a Government employee. Any order of dismissal passed there-after would be unsustainable unless it was permissible under law to the State Government to revoke



order of retirement and to reinstate him in his former status as Government servant. The order before the order of dismissal was passed. Rule 73 (f) of the Bihar Service Code on which reliance is placed by the State Government reads thus :

“Notwithstanding anything contained in foregoing clauses, a Government servant under suspension on a charge of misconduct, shall not be required or permitted to retire on reaching the date of compulsory retirement but shall be retained in service until the enquiry into the charge is concluded and a final order is passed thereon by the competent authority.”

6. The expression ‘compulsory retirement’ found in rule 73 (f) of the Bihar Service Code refers to retirement of a Government servant on his attaining the age of superannuation. This is not a case in which the appellant had been permitted to retire from service on the ground that he had attained the age of superannuation. No order asking the appellant to continue in service before he attained the age of superannuation for the purpose of concluding a departmental inquiry instituted against him had been passed by the competent authority.

On the other hand the appellant had been permitted to retire from service on an invalid pension on medical grounds before he had attained the age of superannuation. Rule 73 (f) of the Bihar Service Code is clearly inapplicable to the case of the appellant. No other provision which enabled the State Government or the competent authority to revoke an order of retirement on invalid pension is

brought to our notice. The order of retirement on medical grounds having thus become effective and final it was not open to the competent authority to proceed with the disciplinary proceedings and to pass an order of punishment. We are of the view that in the absence of such a provision which entitled the State Government to revoke an order of retirement on medical grounds which had become effective and final, the order dated October 5, 1963 passed by the State Government revoking the order of retirement should be held as having been passed without the authority of law and is liable to be set aside. It, therefore, follows that the order of dismissal passed thereafter was also a nullity.

7. We, therefore, allow this appeal, set aside the judgement of the High Court and quash the order of the State Government dated October 5, 1963 revoking the order of retirement of the appellant and the order of dismissal dated November 1, 1963 passed by the Excise Commissioner.

8. We are informed by the learned counsel for the appellant that the appellant had died on December 28, 1984 during the pendency of this appeal. We, therefore, direct the State Government to pay to the legal representatives of the appellant all the arrears of pension due to the appellant from November 1, 1963 up to the date of his death. The State Government shall also pay the costs of this appeal to the legal representatives of the appellant.

Appeal allowed



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**M. P. Thakkar**  
**Judge**  
**Supreme Court of India**

### OBSERVATION

**Disciplinary enquiry—Dismissal—Non-supply of copies of statements of witnesses and copies of documents relied upon by disciplinary authority—Failed to show that no prejudice occasioned to employee—Order of dismissal held was violative of Art. 311 (2). Decision of Allahabad High Court, reversed Constitution of India, Art. 311 (2).**

### OBSERVED BY

Mr. R. S. Pathak and  
 Mr. M. P. Thakkar  
 Hon'ble Judges, Supreme Court of India.

### IN

Civil Appeal No. 2571 of 1977 decided on 15-5-1986 in the case of Kashinath Chhita Appellant v. Union of India and others, Respondents.

### TEXT

Thakkar, J. :—Validity of the impugned order of dismissal is in issue. The scope of the inquiry whether the impugned order of dismissal dated June 11, 1969 is null and void is restricted to two facets. Whether the principles of Natural Justice were violated by the Respondents by refusing to supply to the appellant (1) copies of the statements of the witnesses examined at the stage of preliminary enquiry preceding the commencement of the inquiry and (2) copies of the documents said to have been relied upon by the disciplinary authority in order to establish the charges against the appellant who was holding the post of Superintendent of Police, Bijnor, Uttar Pradesh. Such is the position with regard to the fact that this Court in *Chhagwati, J.* (as he then was) and

Kailasam, J. as per order dated October 25, 1977 whilst granting special leave, has so restricted the scope of the appeal in the following terms :—

“Special leave granted limited only to the question whether there was any violation of Article 311 of the Constitution in regard to the documents and the statement of witnesses referred to in the affidavit of the petitioner dated 12-2-1977.”

3. As many as 8 charges, charges of serious nature, were levelled against the appellant who was at the material time holding the post of Police. The appellant was exonerated of all the charges except and save charges 1 and 2 and charge 8 partly. The particulars of the charges were set out in the Statement of allegations accompanying the charge-sheet dated April 3, 1962. The



appellant challenged the impugned order of dismissal from service in the High Court on a number of grounds. The High Court repelled all the contentions and dismissed the writ petition. It is not necessary to advert to these contentions inasmuch as the controversy has now been narrowed down to one central issue viz whether there has been violation of principles of natural justice by the reason of :

(i) failure to supply copies of the statements of witnesses recorded ex parte at the pre-enquiry stage; and

(ii) the failure to supply copies of the documents on which reliance was placed by the Department to establish the charges before the enquiry commenced.

The following facts are not in dispute :

(i) The appellant had requested for the supply of the copies of all the statements made by the witnesses at a pre-enquiry stage as also for copies of the documents on which reliance was placed in support of the charges levelled against him, as per his letter dated 21-4-1962 Annexure XI of the writ petition addressed to the Chief Secretary.

(2) The request made by the appellant was in terms turned down by the Disciplinary Authority as per his letter dated 25-7-62 Annexure XIX of the Writ Petition.

(3) The Disciplinary Authority granted permission to the appellant to inspect the copies of the statements and documents in question if he so desired.

(4) The request made by the appellant for being accompanied by his Stenographer to whom he could dictate notes based on his inspection was in terms turned down by the Disciplinary Authority, though the appellant was told that he himself could make such notes as he desired on the basis of the inspection made by him.

(5) The aforesaid copies of the statements of the witnesses and the copies of the documents have not been supplied to the appellant till the conclusion of the departmental proceedings.

(6) In all as many as 38 witnesses were examined in the course of the departmental proceeding and as many as 112 documents were produced to substantiate the 8 charges levelled against the appellant.

**Preliminary abjection :**

4. The learned counsel for the respondents have raised a preliminary objection. It has been contended that no point was made before the High Court that the enquiry was vitiated by reason of the failure to supply the statements made by the witnesses at the pre-inquiry stage and the failure to make available the copies of the documents sought to be used against the appellant in order to establish the charges. It is no doubt true that this point has not been discussed in the judgement rendered by the High Court. Even so the preliminary objection must be overruled for two good reasons. Firstly as will be presently shown the averment made on behalf of the petitioner that the point was in fact



**M. P. Thakkar**  
**Judge**  
**Supreme Court of India**

ed before the High Court has not specifically controverted. And ndly, after taking into account the eective affidavits, this Court has gran- special leave permitting the appe- to raise this point (in fact the al leave is restricted only to this t).

What transpired at the stage of spe- leave :

(5) Way back in 1977 a notice was d by this Court to the respondents how cause as to why special leave ppeal should not be granted to the llant when the matter came up be- this Court for grant of special e. In response to the said notice, respondents filed their counter affi- s. The relevant portions of the avits extracted here under show that e the appellant has categorically as- d that the point was raised in the rt, the respondents have not been to controvert the said statement in affidavit in reply and deny the said ation :

The appellant had stated in his affi- t dated 27-10-75 sworn by the appe- as under : —

“That the High Court has also ted to consider the contention d on behalf of the petitioner that e has been violation of the principles natural justice inasmuch as the d of Inquiry has placed reliance on in documents which had not been osed to the petitioner during the iry.” In the counter-affidavit dated ember’ 1976 sworn by Shri Subodh

Nath Jha, Deputy Secretary to Govern- ment of Uttar Pradesh the respondents have not been able to specifically contro- vert the averments made in the affidavit, as will be seen from the following pas- sage :—

“That regarding the contents of paragraph 20, the deponent has to say that the Division Bench of the High Court considered every aspect of the matter and observed ‘A perusal of the report of the Board of Enquiry revealed that it has taken great pains to discuss the entire prosecution and defence ver- sion and given detailed reasons for arri- ving at the conclusion. The Order of dismissal passed by the Government of India is also a well considered order. We are satisfied that the petitioner was afforded a reasonable opportunity to substantiate his case and got a fair hea- ring. The contention, that there has been a violation of Article 311 of the Constitution, has as such to be rejec- ted’.”

6. The appellant in his affidavit da- ted 8-11-1976 sworn by the appellant has stated as under :—

“I was present in the Court at the time of the hearing of the writ petition before the Division Bench of the High Court and my counsel, Shri Shanti Bhushan had argued that there was denial of reasonable opportunity to the petitioner as a result of denial of copies of the documents and statements refer- red to in the Memo of Charges.”

7. In the counter-affidavit dated 29-11-1976 sworn by Shri Ravi Shan-



kar, UDC, Appointment Section-3, U. P. Civil Secretariat, Lucknow the respondents have not been able to specifically controvert the aforesaid averment made in the affidavit, as would be seen from the following passage :—

‘That regarding the contents of paragraph 4, the deponent has to submit as under :—

X X X

(e) That in reply to this sub-para it is stated that the Hon’ble High Court has discussed at length the various pleas and arguments placed on behalf of the petitioner and after due consideration, dismissed the Writ Petition filed by the petitioner.”

It is thus abundantly clear that the point was raised in the High Court, but the High Court has failed to deal, with the question. As discussed earlier, apart from the position which emerges from the affidavits, the fact remains that this Court has permitted the appellant to raise this point when the special leave was granted. (In fact this is the only point on which leave has been granted). It is therefore futile to contend that the appellant is not entitled to urge this point in support of his appeal. The preliminary objection must therefore fail.

was there refusal to supply copies?

8. An examination of the record clearly shows that even though the appellant had in terms demanded copies of the documents and statements in question the disciplinary authority had

turned down the request. On December 3, 1963, the appellant had moved the Board for copies of documents and statements in question. In the application made by the appellant, he has made the request in this behalf in the following terms :

“1. That he has not so far been supplied with copies of the documents cited in evidence and of the statements made by persons named as witnesses on the eight charges framed against me by the first party vide annexures I and II to G. O.

No. CR 70/II-A-1962, dated 3-4-1962 from Mukhya Sachiva, Uttar Pradesh.

2. That to prepare himself for cross examination of the witnesses for rebuttal of prosecution evidence and for adduction of evidence in my defence, the applicant has to make a careful and detailed study of the said documents and statements.

3. That it is only after such a careful study of documents and statements that the applicant shall be able to decide on the names of the witnesses to be examined in my defence and on the nature of documentary evidence to be adduced in defence.

4. X X X X X X

Prayer. (1) that true copies of all the documents cited in evidence on the eight charges against the applicant be kindly supplied to him as early as possible.

(2) That in the case of each statement the place, date and time of the recording of statement and the



**M. P. Thakkar**  
**Judge**  
**Supreme Court of India**

, designation and capacity of the  
 r recording statement be kindly  
 ated.

3) X X X X X X X X X X"

. This application was uncere-  
 ously rejected by the Board on  
 mber 20, 1963.\* It is thus clear  
 the appellant's request fo supply  
 copies of relevant documents and  
 nents of witnesses has been refused  
 unclear terms. We do not consider  
 necessary to burden the records by  
 ng the extracts from the letters ad-  
 ed by rhe appellant and the reply  
 o him.

The extracts quoted hereinabove  
 no room for doubt that the dis-  
 ary authority refused to furnish  
 e appellant copies of documents  
 copies of statements. When a Go-  
 nent servant is facing a discipli-  
 proceedings, he is entitled to be  
 ded a reasonable opportunity to  
 the charges against him in an  
 ive manner And no one facing a  
 rtmental enquiry can effectively  
 the charges unless the copies of  
 relevant statements and documents  
 used against him are made availa-  
 to him. In the absence of such  
 s, how can the concerned employee  
 re his defense, cross-examine the

witnesses, and point out the inconsis-  
 tencies with a view to show that the  
 allegations are incredible? It is difficult  
 to comprehend why the disciplinary  
 authority assumed an intransigent pos-  
 ture and refused to furnish the copies  
 notwithstanding the specific request  
 made by the appellant in this behalf.  
 Perhaps the disciplinary authority made  
 it a prestige issue. If only the discipli-  
 nary authority had asked itself the que-  
 stion: "What is the harm in making  
 available the material?" and weighed  
 the pros and cons, the disciplinary  
 authority could not reasonable have  
 adopted such a rigid and adamant atti-  
 tude. On the one hand there was the  
 risk of the time and effort invested in  
 the departmental enquiry being wasted  
 if the Courts came to the conclusion  
 that failure to supply these mnterials  
 would be tantamount to denial of rea-  
 sonable opportunity to the appellant to  
 defend himself. On the other hand by  
 making available the copies of the docu-  
 ments and statements the disciplinary  
 authority was not running any risk.  
 There was nothing confidential or pri-  
 vileged in it. It is not even the case  
 of the respondent that there was invo-  
 lved any consideration of security of  
 State or privilege. No doubt the disci-  
 plinary authority gave an opportunity

I. P. 139 of the SLP Paperbook :

'Please refer to your application No. KND/BI-2, dated December 3, 1963  
 ding copies of documents and statement cited in evidence.

The Board of Inquiry regrets that it is not possible for them to accede to your  
 est since you have already been allowed by Government an access to the  
 ant official records for the purpose of preparing your written statement as pro-  
 under sub-rule (4) of rule 5 of the All India Services (Discipline and Appeal)  
 s, 1955."



to the appellant to inspect the documents and take notes as mentioned earlier. But even in this connection the reasonable request of the appellant to have the relevant portions of the documents extracted with the help of his stenographer was refused. He was told to himself make such notes as he could. This is evident from the following passage extracted from communication dated 25-7-1962 from the disciplinary authority to the appellant :—

“The Government has been pleased to allow you to inspect all the documents mentioned in Annexure 11 to the charge-sheet given to you. While inspecting the documents, you are also allowed to take notes or even prepare copies, if you so like, but you will not be permitted to take a stenographer or any other person to assist you. In case you want copies of any specific documents, from out of those inspected by you the request will be considered on merits in each case by the Government. In case you want to inspect any document, other than those mentioned in Annexure II, you may make a request accordingly, briefly indicating its relevancy to the charge against you, so that orders of the Government could be obtained for the same. X X X X X As pointed out above, if you wish to have copies of any specific documents, from those inspected by you, you should make a request in writing accordingly, mentioning their relevancy to the charge, so that orders of Government could be obtained.

Government, however, maintain that you are not entitled to ask for copies of documents as a condition precedent to your inspection of the same. I further to add that in case you do inspect the documents, on the date fixed you will do so at your own risk.”

10. And such a stance was adopted in relation to an inquiry whereat as many as 38 witnesses were examined, and documents running into hundreds of pages were produced to substantiate charges. In the facts and circumstances of the case we find it impossible to hold that the appellant was afforded reasonable opportunity to meet the charges levelled against him. Whether or not refusal to supply copies of documents and statements has resulted in prejudice to the employee facing the departmental inquiry depends on the facts of each case. We are not prepared to accede to the submission urged on behalf of respondents that there was no prejudice caused to the appellant, in the facts and circumstances of this case. The appellant in his affidavit page 309 of the Statement of Paper book has set out in a tabular form running into twelve pages as to how he has been prejudiced in regard to his defence on account of the non-supply of the copies of the documents. We do not consider it necessary to burden the record by reproducing the said statements. The respondents have not been able to satisfy us that no prejudice was occasioned to the appellant.

11. Be that as it may, even without going into minute details it



ident that the appellant was entitled to have an access to the documents and statements throughout the course of inquiry. He would have needed these documents and statements in order to cross-examine the 38 witnesses who were produced at the inquiry to establish the charges against him. So at the time of arguments, he would have needed the copies of the documents. Also he would have needed the copies of the documents to enable him to effectively cross examine witnesses with reference to the contents of the documents. It is obvious that he could not have done so if copies had not been made available to him. Taking an overall view of the matter we have no doubt in our mind that the appellant has been denied a reasonable opportunity of exonerating himself. We do not consider it necessary to quote extensively from the authorities cited on behalf of the parties, beyond making passing reference to some of the citations, for, whether or not there has been a denial to afford a reasonable opportunity in the backdrop of this case must substantially depend upon the facts pertaining to this matter.

12. The appellant relied on *Arlok Nath v. Union of India* 1967 1 SCR 759 (SC) in support of the proposition that if a public servant facing an inquiry is not supplied with copies of documents, it would amount to a denial of reasonable opportunity. It has been held in this case :

“Had he decided to do so, the

documents would have been useful to the appellant for cross-examining the witnesses who deposed against him. Again had the copies of the documents been furnished to the appellant he might, after perusing them, well have exercised his right under the rule and asked for an oral inquiry to be held. Therefore in our view the failure of the Inquiry Officer to furnish to the appellant with copies of the documents such as the FIR and statements recorded at Shidhipura house and during the investigation must be held to have caused prejudice to the appellant in making his defence at the inquiry.”

Reliance has also been placed on *State of Punjab v. Bhagat Ram* (1975) 2 SCR 370 : (AIR 1974 SC 2335) and *State of Uttar Pradesh v. Mohd. Sharif (dead) through LRs.* (1982) 2 Lab LJ 180 : (AIR 1982 SC 937) in support of the proposition that copies of statement of witnesses must be supplied to the Government servant facing a departmental inquiry. It has been emphatically stated in *State of Punjab v. Bhagat Ram* by this Court as under :

“The State contended that the respondent was not entitled to get copies of statements. The reasoning of the State was that the respondent was given an opportunity to cross-examine the witnesses and during the cross-examination the respondent would have the opportunity of confronting the witnesses with the statements. It is contended that the synopsis was adequate to acquaint the respondent with the gist of the evidence.



The meaning of a reasonable opportunity of showing cause against the action proposed to be taken is that the Government servant is afforded a reasonable opportunity to defend himself against the charges on which inquiry is held. The Government servant should be given an opportunity to deny his guilt and establish his innocence.

He can do so when he is told what the charges against him are. He can do so by cross-examining the witnesses produced against him. The object of supplying statements is that the Government servant will be able to refer to the previous statements of the witnesses proposed to be examined against the Government servant. Unless the statements are given to the Government servant he will not be able to have an effective and useful cross-examination.

It is unjust and unfair to deny the Government servant copies of statements of witnesses examined during investigation and produced at the inquiry in support of the charges levelled against the Government servant. A synopsis does not satisfy the requirements of giving the Government servant a reasonable opportunity of showing cause against the action proposed to be taken."

13. In view of the pronouncements of this Court it is impossible to

take any other view. As discussed earlier the facts and circumstances of this case also impel us to the conclusion that the appellant has been denied a reasonable opportunity to defend himself. In the result, we are of the opinion that the impugned order of dismissal rendered by the disciplinary authority is violative of Article 311(2) of the Constitution of India inasmuch as the appellant has been denied a reasonable opportunity of defending himself and is on that account null and void. We accordingly allow the appeal. The judgement of the High Court is set aside. The impugned order of dismissal dated 10-11-1967 passed against the appellant is quashed and set aside. We further declare that the impugned order of dismissal is a nullity and non-existent in the eye of law and the appellant must be treated as having continued in service till the date of his superannuation on January 31, 1983. Taking into account the facts and circumstances of this case and the time which has elapsed we are of the opinion that the State Government should not be permitted to hold a fresh inquiry against the appellant on the charges in question. We therefore direct the State Government not to do so. 14. The appeal is allowed accordingly with costs throughout.

Appeal allowed.



### OBSERVATION

Constitution of India, Arts. 15, 32—Superannuation—Age of officers of Bharat Petroleum fixed at 58 years while that of clerks at 60 years not discriminatory Jurisdictions under Art. 32 and S. 10, I D. Act compared (Industrial Disputes Act (14 of 1947), S. 10).

### OBSERVED BY

Mr. R.S. Pathak and Mr. R. N. Misra  
Hon'ble Judges, Supreme Court of India

### IN

Writ petn. (Civil) Nos. 1566-67 and 1548-71 of 1984 and 2740-45 of 1985, decided 1-9-1986 in the case of Tejinder Singh and another, Petitioners v. M/s. Bharat Petroleum Corporation Limited another, Respondents.

And

D. P. Gupta and others, Petitioners v. M/s. Bharat Petroleum Corporation Ltd. another, Respondent.

And

K. P. Gokhale and others, Petitioners v. M/s. Bharat petroleum Corporation Ltd, Respondent.

### TEXT

Ranganath Misra, J:— All these petitions under Article 32 of the Constitution are by officers called the Management Staff employed under the respondent No. 1 and challenge in all Writ petitions is to the age of superannuation at 58 Years. The principal ground of attack is discrimination between the clerical staff for whom the age of retirement is 60 years and the management staff in whose case such age is 58 years. It is also the contention of the petitioners that in keeping with the current trend in the commercial field such age should be fixed at 60.

2. Each of the petitioners in Writ Petitions Nos. 15466 and 16467 of 1984 and 2745 of 1985 is a recent recruit for the management staff while each of the petitioners in the remaining cases was an employee under the Burmah Shell Oil Storage and Distributing Company of India Limited and after the take over of that Company under the Burmah Shell (Acquisition of Undertakings in India) Act, 1976, has become an officer of respondent No. 1.

3. In *Som Prakash Rekhi v. Union of India*, (1981) 2 SCR 111 : (AIR 1981 SC 212), this Court has held respondent No. 1 to be "State" within



the meaning of Article 12 of the Constitution. There has, therefore, been on dispute before us that the petitioners would be entitled to invoke the protection of Article 14 in case there indeed be any discrimination.

4. This Court in *Workmen of the Bharat Petroleum Corpn. Ltd. (Refining Division) Bombay v. Bharat Petroleum Corpn. Ltd.* (1984) 1 SCR 251 : (AIR 1984 SC 356), directed the retirement age of the clerical staff of the Refinery Division of respondent No. 1 to be fixed at 60 years. Petitioners have contended that the disparity in the age of retirement between two groups of employees gives rise to discriminatory treatment. This stand is not tenable for more than one reason. Clerical staff and officers of the management staff belong to separate classifications and no argument is necessary in support of it. Petitioners have not contended and perhaps could not legitimately contend, that the two classes of officers stand at par. In the *Workmen's* case itself, this Court did not extend the benefit of superannuation at the age of 60 to all clerical staff but limited the same to that category of employees working in the Refinery Division, Bombay. Classification on the basis of reasonable differentia is a well-known basis and we are of the view that the petitioners are not entitled in the facts of the case to seek support from Article 14 for their claim.

5. The claim of the clerical staff arose in an industrial dispute. The scope of such

an adjudication is wide and broad. The Tribunal has expansive jurisdiction to exercise when a reference is made to it. This Court in appeal against the Award was exercising the same jurisdiction in that case. We do not think it would be appropriate for this Court to exercise that jurisdiction in dealing with an application under Article 32 of the Constitution. It must also be remembered that officers of the management staff are not workmen.

6. It is true that this Court in *Workmen of the Bharat Petroleum Corporation Ltd (Refining Division) Bombay* (AIR 1984 SC 356) quoted with approval its earlier observations in *British Paints (India) Ltd. v. Its workmen* (1966) 2 SCR 523 : (AIR 1966 SC 732) where it was said :

“But time in our opinion has not come for considering the improvement in the standard of health and increase in longevity in this country during the last fifty years that the age of retirement should be fixed at a higher level, and we consider that generally speaking in the present circumstances fixing the age of retirement at 60 years would be fair and proper, unless there are special circumstances justifying fixation of a lower age of retirement.”

Again in *G. M. Talang v. Sh. Wallace and Co.* (1964) 7 SCR 424 : (AIR 1964 SC 1886), this Court referred to the Report of the Norms Committee where it was said :

“After taking into consideration the views of the earlier Committees



commissions including those of the Second Pay Commission the report of which has been released recently, we feel that the retirement age for workmen in all industries should be fixed at 60".

A distinction in the treatment on the point in issue between workmen and officers is clearly discernible in judicial thinking as also expert opinion. Besides, the petitioners have not brought before the Court all the material relevant to the making of a claim as made from which support could be had. On the other hand, the respondent No. 1 in its affidavit in opposition has placed various aspects to justify the continuation of the present

age of retirement. It may be that some day, in keeping with the trend of the times, a claim of the type as laid in these applications may have to be examined. We, however, hope that adjudication will be required to be made on more cogent and appropriate material than now. If this Court is moved, it has then to be considered whether an application under Article 32 is the proper remedy for it. We are, however, of the view that the petitioners are not entitled to their claim in these applications. The Writ Petitions are dismissed but without costs.

Petitions dismissed



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## OBSERVATION

(A) Service matter—Writ petition before Supreme Court alleging denial of promotional opportunities due to irregular implementation of relevant rules—Question left open to be decided by Administrative Tribunal in view of inadequacy of material and non impleading persons likely to be affected by Administrative Tribunal Act (13 of 1985), S. 28) Constitution of India, Arts. 32, 311.

(B) Direct recruits and promotees—Discrimination between Promotees and Officers of Telecommunication Research Centre granted Special Pay Denial of direct recruits though doing same job and possessing equal qualifications—Unlawful, discriminatory (Scientific & Technical Officers Grade I (Telecommunications Research Centre of the Posts & Telegraph) Department) Recruitment Rules (1962), R. 17). Constitution of India Arts 16, 14.

## OBSERVED BY

Mr. E. S. Venkataramiah and Mr. K. N. Singh  
 Hon'ble Judges, Supreme Court of India

## IN

Writ Petitions Nos. 3269-3290 of 1982 decided on 16-1-1987 in the case of Telecommunication Research Centre Scientific Officers (Class I) Association and others, Petitioners v. Union of India and others, Respondents.

## TEXT

Venkataramiah, J. :—The first petitioner in these petitions is the Telecommunication Research Centre Scientific Officers (Class I) Association. The petitioners 2 to 22 are its members. They are working as officers in the Telecommunication Research Centre of the posts and Telegraph Department which is directly under the control of the P & T Board of the Ministry of Communications, Government of India. The Telecommunications Research Centre is engaged in the research and development work concerning the telecommunication equip-

ment for the use of the Department and in advising the P & T Board on relevant technical matters relating to the introduction of new equipment and technology in the existing public communication network. The recruitment to the different cadres in the Telecommunication Research Centre is now being made under the Scientific and Technical officers Grade I (Telecommunications Research Centre of the Posts and Telegraphs Department) Recruitment Rules, 1962 (hereinafter referred to as "the Recruitment Rules") framed by the President under the pro-



visio to Article 309 of the Constitution of India. During the period between 1956 & 1962 and further till 1965 all the Class 1 posts of the Scientific and Technical officers Grade 1 namely Assistant Director and Deputy Director were manned by the Transferred Field Officers belonging to the Indian Telecommunication Service Group A & Group B. For the first time the Union Public Service Commission advertised for the recruitment of 10 Scientific and Technical Officers Grade 1 in the Telecommunications Research Centre under the Recruitment Rules. These were General Central Service Class 1 posts and they continue to be so till today. In response to the said advertisement petitioners 2, 3 and 4 applied for recruitment and they were selected for appointment to the posts of S & T. O. Grade 1. At the time of the filing of these writ petitions there were in all 21 officers who had been recruited at the entry level of Junior Class 1 posts of S & T. Os. Grade 1. They were recruited in four batches in 1965, 1967, 1970 and 1973.

2. The Class I posts in the Telecommunication Research Centre consist of the following posts :

1. Director (Senior Administrative Grade Level I)
2. Additional Director (Senior Administrative Grade Level II)
3. Deputy Directors (Junior Administrative Grade)
4. Assistant Directors (Senior Class I)
5. Scientific and Technical officers

Grade I (Junior Class I).

3. The posts of Deputy Directors, Assistant Directors and S. T. Grade I are filled by the following methods :

(a) by direct recruitment through the Union Public Service Commission (The petitioners belong to this category. They are now holding the posts of Assistant Directors or Deputy Directors since 1975. Direct recruitment to the Telecommunication Research Centre has been discontinued.)

(b) by transfer of Group A Field Officers recruited through the Union Public Service Commission by written examination followed by an interview (These officers belong to the Indian Telecommunication Service Group A and

(c) by transfer of Group B Field Officers who are Posts and Telegraph departmental promotees belonging to the Telegraph Engineering Service Group B.

4. The direct recruits to which category the petitioners belong are the Transferred Field Officers Group A working in the Telecommunication Research Centre discharge same functions and duties. The qualifications for recruitment prescribed in the case of both classes are the same. They are in the same pay scales from 1-1-1956 at the comparable levels/grades, i.e. Scientific and Technical Officers Grade I, Assistant Directors and Deputy Directors as recommended by the Third Pay Commission and accepted by the



Government.

5. In these petitions, the petitioners have raised two grounds, namely, the first relating to the denial of promotional opportunities to them on account of the irregular implementation of the rules of promotion contained in the Recruitment Rules and the second relating to violation of Article 14 and Article 16 of the Constitution by not granting them the same special pay which is granted to the transferred officers who are working in the Telecommunication Research Centre in the same posts and discharging the same functions as the petitioners.

6. Having regard to the inadequacy of the material produced by both the sides before us and to the fact that the officers who are likely to be affected by the decision are not impleaded as parties by name to these petitions, we are of the view that first question should be left open to be decided by the Central Administrative Tribunal. We accordingly express no opinion on the said question.

7. The second question relating to the grant of Special Pay requires to be decided by us. It is seen that the Indian Telecommunication Service Officers who are working in the Telecommunication Research Centre are being given Special Pay of Rs. 300/-RS. 200/-and Rs. 150/- per month in addition to their pay scales in the grades of Deputy Director, Assistant Director and Scientific and Technical Officers Grade I respectively with effect from 1-1-1973. The direct recruits to which

category the petitioners belong are not given any Special Pay in these grades and they are given only the pay at the pay scales prescribed for them. It is stated that the total number of officers who are thus getting Special pay is of the order of 275 while only about 25 officers who are direct recruits working in the Telecommunication Research Centre are not given Special Pay paid to the others holding the same posts. A number of representations had been made earlier by the direct recruits but all in vain. It appears that at the official meeting held in May, 1979 with Shri J. A. Dava Secretary, Communication, Government of India, there was consensus on the question of granting of Special Pay to the direct recruits as in the case of transferred officers as can be seen from the letter written by the Association of the petitioners (Annexure XIX) and that the Director, Telecommunication Research Centre also recommended for granting Special Pay accordingly. But nothing came out of all this. Hence the petitioners have filed these petitions demanding payment of Special pay to them also.

8. The discrimination between the direct recruits and the transferred officers regarding the payment of Special Pay is attempted to be justified by the Government in the counter affidavit filed by Shri C. L. Sumon, Assistant Director General (P & T Directorate). It is stated that the petitioners (direct recruits) who are specifically recruited to the Telecommunication Research



Centre for a limited purpose are not entitled to any Special Pay but the transferred officers from the Indian Telecommunications Service who are selected by the Union Public Service Commission after a rigorous competitive examination need to be paid Special Pay. It is alleged that 'it is felt that most of the direct recruits TRC officers may be good in small areas in which they are working but their capability of taking over a complete group and directing them to fruitful research is doubtful'. This statement is a vague one and has the effect of adding insult to injury. This allegation appears to be a lame excuse for denying what is legitimately due to the direct recruits. It is not the case of the Government that the petitioners are not competent and are not able to discharge their duties. All the direct recruits are graduate engineers and have been working throughout in the Telecommunication Research Centre. They do the same job as the transferred officials. The Special Pay is not being paid to the transferred officials for compensating their displacement or for their qualifications. It is not deputation allowance. It is paid for the arduous and special nature of the functions to be discharged in the Telecommunication Research Centre. The rigorous test is applied while transferring them to the Telecommunication Research Centre to prevent persons of inferior calibre amongst them getting into the said centre. It does not mean that persons who are directly recruited and working in the

centre are inferior those who enter the centre by transfer. It is interesting to note that the Minister of State for Communications answered the question relating to non-payment of Special Pay in the Lok Sabha on March 30, 1964 thus:

"Question No. 5864—Will the Minister of Communications be pleased to state:

(c) whether it is a fact that Special Pay is not given to a few graduate engineers recruited specifically for TRC while the qualifications, duties and responsibilities of these officers in TRC are the same as those of the field officers transferred to TRC and what is the reason for not doing so?"

Answer—Minister of State for Communications:

2. The officers specifically recruited for TCR through UPSC, are performing functions for which they are recruited while on the other hand, the officers drawn from the ITS cadre, when posted in TRC, are required to perform duties which are not in their general line."

9. It is seen from the above answer that the Government had virtually admitted that all relevant things such as qualifications, functions, duties and responsibilities are the same as between direct recruits and the transferred officials and that the transferred officials had to be paid extra amount by way of Special pay in addition to their scale of pay which is the same as the scale of pay of direct recruits because the transferred officials had to perform in the Telecommunication Research Centre



**E. S. Venkataramiah**  
**Judge**  
**Supreme Court of India**

communication Research Centre duties which are not in their general line. In another part of the same answer it was also admitted that many such transferred officials were in the Telecommunication Research Centre for more than six years. Still the Government did not show any eagerness to grant special pay to the direct recruits also. We feel that there is no justification to deny the Special Pay at the same rates to the direct recruits working in the Telecommunication Research Centre. Denial of Special Pay in the above circumstances to the direct recruits amounts to violation of Articles 14 and 16 of the Constitution of India.

10. Following the decision of this Court in *Randhir Singh v. Union of India*, (1982) 3 SCR 298: (AIR 1981 SC 199) and the decision of this Court in *P. Singh v. Union of India* (Writ Petns. Nos. 13097—13176 of 1984 decided today) (reported in AIR 1987 SC 155) we hold that the direct recruits (to which category the petitioners belong)

in the Telecommunication Research Centre are entitled to the Special Pay at the same rates at which it is paid to the transferred officers working in that centre with effect from the date from which the transferred officers have been drawing the Special Pay. We accordingly direct the Respondent No. 1—Union of India to pay the special pay to the direct recruits with effect from the date on which the transferred officers commenced to draw the Special Pay up to date and to continue to pay it in future also as long as the transferred officers continue to get it. The arrears of the Special Pay up to date payable to the direct recruits shall be paid within four months from today.

11. The above petitions are allowed to the above extent. The question relating to the denial of promotional opportunities to the petitioners according to the Recruitment Rules is left open to be agitated before the Central Administrative Tribunal. No costs.

Petitions partly allowed.



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## OBSERVATION

(A) Unauthorised occupation of Government quarter by employee—Recovery of damages equivalent to market rent—Prior notice to employee not necessary—Held relaxation by Government or estopped against it could not be inferred instant case. (Evidence Act (1 of 1872), S. 115): (Fundamental Rules, 1963), SR 317-B-11 and 22.

(B) Pensions Act (23 of 1871), S 11—Words “money due or to become due in account of Pension”—Include commuted portion of pension payable to retired employee—Rent due from such employee for occupying Government quarter—Cannot be deducted from the amount of commuted pension.

## OBSERVED BY

Mr. A. P. Sen and Mr. S. Natarajan  
Hon'ble Judges, Supreme Court of India

## IN

Civil Appeal No. 4426 of 1986 (In SLP. No. (16044 of 1985) decided on 30-1-1987) the case of Union of India and another, Appellant v. Wing Commander, R. R. Hingani (Retd.) Respondent.

## TEXT

A. P. Sen, J. :— This appeal by special leave directed against the judgement and order of the Delhi High Court dated September 11, 1985 raises question of subsequent occurrence. The question is whether where a Government servant requisitioned accommodation allotted to him under SR 317-B-11 beyond the concessional period of two months permissible under r. (2) thereof, the liability to pay damages equivalent to the market rent for the such period of unauthorised occupation under SR 317-B-22 is contingent upon the Directorate of Estates serving notice upon him that he would be liable to pay market rent for retention of such accommodation as he by the High

Court.

2. Put very briefly, the essential facts are these. In the year 1968 the respondent who was then a Squadron Leader in the Indian Air Force on being posted at the Headquarters, Western Command, Palam, Cantonment, Delhi, applied on May 9, 1986 for allotment of accommodation in the Curzon Road Hostel, New Delhi. In the application for allotment he gave a declaration that he had read the Allotment of Government Residences (General Pool in Delhi) Rules, 1963 and the allotment made to him shall be subject to the said Rules, including the amendments made thereto. The Directorate of Estates by its



order dated June 27, 1968 allotted Flat No. 806-B to the respondent in the Curzon Road Hostel on a rent of Rs. 161/- per month, exclusive of electricity and water charges. The respondent was transferred from Delhi to Chandigarh on June 11, 1970 and therefore the allotment of the flat to him stood automatically cancelled under sub-r. (3) of SR 317-B-11 after the concessional period of two months from the date of his transfer i. e. w. e. f. August 11, 1970. He however did not give any intimation of his transfer to the Directorate of Estates with the result that he continued in anauthorised occupation of the said flat for a period of nearly five years and was being charged the normal rent for that period. On February 28, 1975 the Estate Officer having come to know about the transfer of the respondent from Delhi, the Directorate addressed a letter dated March 18, 1975 cancelling the allotment w. e. f. August 11, 1970 and intimating that he was in unauthorised occupation thereof. On the next day i. e. the 19th, the Directorate sent another letter asking the respondent to vacate the flat. On March 25, 1975 the respondent vacated the flat and handed over possession of the same to the Directorate of Estates. But he addressed a letter of even date by which he repudiated his liability to pay damages alleging that he was in possession of the flat under a valid contract and that at no time was he in unauthorised occupation and further that under the said contract he was not liable to pay damages.

3. It appears that there was so correspondence between the parties that the respondent disputed his liability to pay damages for the period of his authorised occupation. In consequence thereof, proceedings were initiated against the Estate Officer under S. 7 of the Public Premises (Eviction of Unauthorised occupants) Act, 1971 to recover Rs. 38,811.17 p. as damages. The Estate Officer duly served notices on the respondent under S. 7(3) of the Act from time to time and the respondent appeared in the proceedings and contested the claim. Apparently, the respondent in the meanwhile made a representation to the Central Government. On such representation being made, the Government on compassionate grounds reduced the amount to Rs. 20,482.78 and deducted the same on October 1, 1976 from out of the commuted pension payable to the respondent. On November 25, 1976 the respondent appeared and protested against the recovery of the amount of Rs. 20,482.78 from the commuted pension payable to him which, according to him was contrary to S. 11 of the Pensions Act, 1871, by process of seizure and sequestration. The respondent complained that despite his repeated requests, he was not given opportunity of a hearing and was informed that the matter being examined in depth, and that the whole procedure was arbitrary and capricious.

4. The respondent filed a petition in the High Court under Art. 226 of the Constitution challenging the action



the Government in making a unilateral deduction of Rs. 20,487.78 p. towards recovery of damages from the commuted pension payable to him, which, according to him, was contrary to S. 11 of the Pensions Act, 1871. The writ petition was allowed by a learned single judge by his judgement and order dated September 7, 1981 who held that although the allotment of the flat to the respondent stood cancelled in terms of sub-r. (3) of SR 317-B-22 w. e. f. August 11, 1970 i. e. after the concessional period of two months from the date of his transfer, the Government was estopped from claiming the amount of Rs. 20,484.78 p. as damages equivalent to the market rent under SR. 317-B-22 for the period from August 11, 1970 to March 25, 1975. Coming to that conclusion, the learned single Judge held that the Government not only knowingly allowed the respondent to continue in occupation till March 25, 1975 and charged him the normal rent of Rs. 161/- per month presumably under its power of relaxation under SR 317-B-25. Further, he held that the Government having failed to serve the respondent with a notice that he would be liable to pay market rent for the period of such unauthorised occupation, the doctrine of promissory estoppel precluded the Government from claiming damages equivalent to the market rent under SR 317-B-22 for the period in question. Aggrieved, the appellant preferred an appeal but a Division Bench by its judgement under appeal affirmed the decision of the learned

single Judge. It based its decision mainly on the terms of SR 317-B-25 which confer the power of relaxation on the Government and held that since the Government had not recovered the rent at the market rate as permissible under SR 317-B-22 w. e. f. August 11, 1970 and having knowingly allowed the respondent to retain the flat for the period in question, it must be presumed that Government had acted in exercise of its power of relaxation under SR 317-B-25.

5. In support of the appeal Shri G. Ramasway, learned Additional Solicitor General mainly advanced two contentions. First of these is that where a Government servant has retained the government accommodation allotted to him under SR 317-B-11 (1) beyond the concessional period of two months allowed under sub-r. (2) thereof, the liability to pay damages equal to the market rent for the period of his unauthorised occupation is not a contingent liability. It is urged that the High Court was in error in holding that the appellant was not entitled to deduct Rs. 20,482.78 p. from the commuted pension payable to the respondent because of the failure of the Directorate of Estates to serve the respondent with a notice after the allotment of the flat in question stood automatically cancelled w. e. f. August 11, 1970. Secondly he submits that the construction placed by the High Court upon SR. 317-B-22 was plainly erroneous. It is submitted that the High Court was wrong in assuming that there



was some kind of estoppel operating against the Government and in proceeding upon the basis that recovery of damages equivalent to the market rent for use and occupation for the period of unauthorised occupation was punitive in nature and therefore the Court had power to grant relief against recovery of damages at that rate. These contentions must, in our opinion prevail.

6. It would be convenient here to set out the relevant statutory provisions. Sub-s. (2) of S. 7 of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 invests the Estate Officer with authority to direct the recovery of damages from any person who is, or has at any time been, in unauthorised occupation of any public premises, having regard to such principles of assessment of damages as may be prescribed, R. 8 of the Public Premises (Eviction of Unauthorised Occupants) Rules, 1971 lays down the principles for assessment of such damages. Among other things, R. 8 (c) provides that in making assessment of damages for unauthorised use and occupation of any public premises, the Estate Officer shall take into consideration the rent that would have been realised if the premises had been let on rent for period of unauthorised occupation to a private person. Allotment of residential premises owned by Government in Delhi is regulated by the Allotment of Government Residences (General Pool in Delhi) Rules, 1963. Sub-r (1) of SR 317-B-11 pro-

vide inter alia that an allotment of such premises to a Government officer shall continue in force until the expiry of the concessional period permissible under sub-r. (2) thereof after the officer ceases to be on duty in an eligible office in Delhi. Subr. (2) of SR 317-B-11 provides that a residence allotted to a Government officer may, subject to sub-r. (3), be retained on the happening of any of the events specified in Column I of the Table underneath for the period specified in the corresponding entry in Column 2 thereunder. The permissible period for retention of such premises in the event of transfer of the Government Officer to a place outside Delhi is a period of two months. SR 317-B-22 insofar as material provides follows:

“Where, after an allotment has been cancelled or is deemed to be cancelled under any provision contained in these rules, the residence remains in occupation of the officer to whom it was allotted or of any person claiming through him, such officer shall be liable to pay damages for use and occupation of the residence, services, furnitures and garden charges equal to the market licence fee as may be determined by Government from time to time.”

7. It is difficult to sustain the judgement of the High Court or the reasons therefor. The construction placed by the High Court on the two provisions contained in SR 317-B-22 and SR 317-B-25 is apparently erroneous. It is plain upon the terms of SR



A. P. Sen

Judge

Supreme Court of India

B-25 that the liability to pay damages equal to the market rent beyond the concessional period is an absolute liability and not a contingent one. Both the learned single Judge as well as the Division Bench were clearly in error in subjecting the liability of a Government Officer to the market rent for the period of unauthorised occupation to the fulfilment of the condition that the Director of Estates should serve him with notice that in the event of his continuing in unauthorised occupation he would be liable to pay market rent. They were also in error in proceeding upon the wrongful assumption that the Government had not recovered the rent at the market rate as permissible under SR 317-B-22 and allowed the respondent to continue in unauthorised occupation for a period of only five years, it must be presumed that the Government had relaxed the condition in favour of the respondent under SR 317-B-25. The view expressed by the High Court that there was a pre-emption of relaxation of the condition of payment of market rent under SR 317-B-22 due to inaction on the part of the Government, is not at all correct. If it was a valid exercise of relaxation, the condition pre-requisite under SR 317-B-25 is that the Government may relax any or any of the provisions of the Rules in the case of any officer or residence belonging to any class of officers or types of residences for reasons to be recorded in writing. There was no question of any presumption arising for the relaxation which

had to be by a specific order by the Government for reasons to be recorded in writing. Nor was there a question of any promissory estoppel operating against the Government in a matter of this kind.

8. In the facts and circumstances of the present case, the respondent had given a declaration in his application for allotment that he had read the Allotment of Government Residences (General Pool in Delhi) Rules, 1963 and that the allotment made to him shall be subject to the said Rules as amended from time. According to sub-r. (3) of SR 317-B-11 the allotment was to continue till the expiry of the concessional period of two months under sub-r. (2) thereof after June 11, 1970, the date of transfer and thereafter it would be deemed to have been cancelled. It is not disputed that the respondent continued to remain in occupation of the premises unauthorisedly from August 11, 1970 even after his transfer outside Delhi. He was not entitled to retain any accommodation either general pool or the defence pool once he was transferred to a place outside Delhi. The respondent retained the flat in question at his own peril with full knowledge of the consequences. He was bound by the declaration to abide by the Allotment Rules and was clearly liable under SR 317-B-22 to pay damages equal to the market rent for the period of his unauthorised occupation. Before an estoppel can arise, there must be first a representation of an existing fact distinct from a mere promise-



made by one party to the other; secondly that the other party believing it must have been induced to act on the faith of it; and thirdly, that he must have so acted to his detriment. In this case, there was no representation or conduct amounting to representation on the part of the Government intended to induce the respondent to believe that he was permitted to occupy the flat in question on payment of normal rent or that he was induced to change his position on the faith of it. If there was any omission, it was on the part of the respondent in concealing the fact from the Director of Estates that he had been transferred to a place outside Delhi. There was clearly a duty on his part to disclose the fact to the authorities. There is nothing to show that he was misled by the Government against whom he claims the estoppel. It is somewhat strange that the High Court should have spelled out that the respondent being a Squadron Leader was an employee of the Central Government and therefore the Government of India to whom the Curzon Road Hostel belongs must have had knowledge of the fact of his transfer. The entire judgement of the High Court proceeds upon this wrongful assumption.

9. In the premises, it is difficult to sustain the judgement of the High Court and it has to be reversed. Nonetheless, the writ petition must still succeed for another reason. It is somewhat strange that the High Court should have failed to apply its mind to the most crucial question involved,

namely, that the Government was competent to recover the amount of 20, 482 78p. alleged to be due payable towards damages on account of unauthorised use and occupation of the flat from the commuted pension payable to the respondent which was clearly against the terms of S. 11 of the Pensions Act, 1871 which reads as follows:

“Exemption of pension from attachment:—

No pension granted or continued by Government on political considerations, or on account of past services or present infirmities or as a compassionate allowance, and no money due or to become due on account of any such pension or allowance, shall be liable to seizure, attachment or sequestration by process of any Court at the instance of a creditor, for, any demand against the pensioner, or in satisfaction of a decree or order of any such Court. According to its plain terms. S. 11 protects from attachment, seizure or sequestration pension or money due or to become due on account of any such pensions. The words “money due or to become due on account of pension” in its necessary implication mean money that has not yet been paid on account of pension or has not been received by the pensioner and therefore wide enough to include commuted pension. The controversy whether on commutation of pension the commuted pension becomes a capital sum or still retains the character of pension so long as it remains unpaid in the hands of the Government.



A. P. Sen

Judge

Supreme Court of India

ment, is not a new one till it was settled by the judgement of this Court in *Union of India v. Jyoti Chit Fund Finance*, (1976) 3 SCR 763: We may briefly touch upon the earlier decisions on the question. In an English case, in *Crowe v. Price*, (1819) 58 LJ QB 215 it was held that money paid to a retired officer of His Majesty's force for the commutation of his pension does not retain its character as pension so as to prevent it from being taken in execution. On 217 of the Report, Coleridge, C. J. said;

"It is clear to me that commutation money stands on an entirely different ground from pension money, and that if an officer commuted his pension for a capital sum paid down, the rules which apply to pension money and make any assignment of it void do not apply to this sum."

Following the dictum of Coleridge, J., Besley, C. J. and King, J. in *Municipal Council, Salem v. B. Curuajah* 58 ILR 469: (AIR 1935 Mad 249) held that when pension or portion thereof is commuted, it ceases to be pension and becomes a capital sum. The question in that case was whether the commuted portion of the pension of a retired Subordinate Judge was income for purposes of assessment of professional tax under S. 354 of the Madras District Municipalities Act, 1920. The learned Judges held that where pension is commuted there is no longer any periodical payment; the pensioner receives once

and for all a lump sum in lieu of the periodical payments. The pension is changed into something else and becomes a capital sum. On that view they held that the sum received by the retired Subordinate Judge in lieu of the portion of his pension when it was commuted was no longer pension and therefore not liable to pay a professional tax under S. 354 of the Madras District Municipalities Act. That is to say, the commuted portion of the pension was not income for purposes of assessment of professional tax in a municipality. The question arose in a different form in *C. Gopalachariar v. Deep Chand Sowcar*, AIR 1941 Mad. 207 and it was whether the commuted portion of the pension was not attachable in execution of a decree obtained by certain creditors in view of S. 11 of the Pensions Act. Pandurang Row, J. interpreting S. 11 of the Act was of the opinion that not only the pension but any portion of it which is commuted came within the provisions of the section. He particularly referred to the words "money due or to become due on account of pension" appearing in S. 11 of the Act which, according to him, would necessarily include the commuted portion of the pension. He observed that the phrase "on account of" is a phrase used in ordinary parlance and is certainly not a term of art which has acquired a definite or precise meaning in law. According to its ordinary commutation the phrase "on account of" means "by reason of" and he therefore queried:



“Now can it be said that the commuted portion of the pension is not money due on account of the pension? Though the pension has been commuted, still can it be said that money due by reason of such commutation or because of such commutation, is not money due on account of pension ?

He referred to S. 10 of the Act which provides for the mode of commutation and is part of Chapter III which is headed “Mode of Payment”. and observed:

“In other words, the commutation of pension is regarded as a mode of payment of pension. If so, can it be reasonably urged that payment of the commutation amount is not payment on account of the pension itself, because after commutation it ceases to be pension? I see no good reason why it should be deemed to be otherwise. No doubt money is due immediately under the commutation order, but the commutation order itself is on account of a pension which was commuted or a portion of the pension which was commuted. The intention behind the provisions of S. 11, Pensions Act, is applicable to the commuted portion as well as to the uncommuted portion of the pension and the language of S. 11 does not appear to exclude from its protection the money that is due under a commutation order commuting a part of the pension.”

10. In *Hassomal Sangumal v. Diaromal Laloomal*, AIR 1952 Sind 19 Davis, C. J. speaking for a Division Bench referred to *Gopalalachariar's* case and pointed

out that it does not lay down that once a pension has been commuted and the money paid over to the pensioner, the exemption from attachment still continues. The learned Chief Justice went on to say that the words “money due or to become due” used in S. 11 must by necessary implication mean the money that has not yet been paid to the pensioner.

11 In *Jyoti Chit Fund's* case (AIR 1976 SC 1163) the Court repelled the contention that since the civil servant had already retired, the provident fund amount, pension and other compulsory deposits which were in the hands of the Government and payable to him had ceased to retain their character as such provident fund or pension under Ss. 3 and 4 of the Provident Funds Act, 1925 Krishna Iyer, J. speaking for himself and Chandrachud, J. observed.

“On first principles and on precedent, we are clear in our minds that these sums, if they are of the character set up by the Union of India, are beyond the reach of the Court's power to attach. S. 2 (a) of the Provident Funds Act had also to be read in this connection to remove possible doubts because this definitional clause is of wide amplitude. Moreover, S. 60 (1), provisos (g) and (k), leave no doubt on the point of non-attachability. The matter is so plain that discussion is uncalled for.

We may state without fear of contradiction that provident fund amounts, pensions and other compulsory deposits covered by the provisions we



referred to, retain their character until they reach the hands of the employee. The reality of the protection is reduced to illusory formality if we accept the interpretation sought."

12. The learned Additional Solicitor General has very fairly brought to notice Circular No. F. 7 (28) EV/53 dated August 25, 1985 issued by the Government of India, Ministry of Finance to the effect :

"When a pensioner refuses to pay Government dues -

The failure or refusal of a pensioner to pay any amount owned by him to the Government cannot be said to be 'misconduct' within the meaning of Section 351 of the C. S. R. (Rule 8, C. S. R. (Pension) Rules, 1972). The only possible way of recovering/demanding Government dues from a retiring officer who refuses to agree in writing, to the dues being recovered from his pension is either to delay the final sanction of his pension for some time which will have the desired effect for persuading him to agree to recovery of dues made therefrom or take recourse to the Court of law."

It bears out the construction that the words "money due or to become due on account of pension" occurring in S. 11 of the Pension Act, 1871 include the commuted portion of the pension payable to an employee after his retirement. It must accordingly be held that the Government had no authority or power to unilaterally deduct the amount of Rs. 20, 482.78p.

from the commuted pension payable to the respondent, contrary to S. 11 of the Pension Act, 1871.

13 For these reasons, the appeal partly succeeds and is allowed. The judgement and order of the High Court are set aside. We allow the writ petition filed by the respondent in the High Court and direct that a writ of mandamus be issued ordaining the Central Government to refund the amount of Rs. 20, 482.78p. deducted from the commuted pension paid to the respondent. The Government shall be at liberty to initiate proceedings under S. 7 (2) read with S. 14 of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 for recovery of Rs. 20, 482.78p. due on account of damages for unauthorised use and occupation of the flat in question from the respondent as arrears of land revenue or have recourse to its remedy by way of a suit for recovery of damages.

14. Before parting with the case, we wish to add a few words. The Government should consider the feasibility of dropping the proceedings for recovery of damages, if the respondent were to forego his claim for interest. In this case, the deduction of the amount of Rs. 20, 482.78p. from the commuted pension payable to the respondent was made as far back as October 30, 1976. Since then, 10 years have gone by. Even if interest were to be calculated at 9% per annum, the interest alone would aggregate to more than Rs. 18,000. Since



the Government had the benefit of the money for all these years, it may not be worth-while in pursuing the matter any further.

15. There shall be no order as to costs.

Order accordingly.

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M. M. Dutt

Judge

Supreme Court of India

## OBSERVATION

A) All India Services Act (61 of 1951), S. 3—All India Services Confidential (s) Rules (1970), R 2 Cls (e), (f) and (a)—Inspector General of Police, Haryana—Is head of Police Department—Writing of confidential report by the Secretary of State, on his work and conduct—Not proper. (Police Act of 1861), Ss. 3, 4); (Punjab Police Rules (1934), R. 1. 2); (Constitution of India, 166); (Business of the Haryana Government (Allocation) Rules (1974), Rr 1 Sch. item 17).

B) All India Services Act (61 of 1951), S. 3—All India Services (Confidential Rolls) Rules (1970), Rr. 5, 6, 6-A, 7—Adverse remarks—Communication Provisions of Rr 5, 6, 6-A and 7 are directory—Substantial Compliance is sufficient—Inordinate delay in communicating adverse remarks—Held, not proper.

## OBSERVED BY

Mr. O. Chinnappa Reddy And Mr. Murari Mohon Dutt,  
Hon'ble Judges, Supreme Court of India.

## IN

Civil Appeal No. 4395 of 1986 decided on 16-4-1987 in the case of State of Haryana, Appellant v. Shri P.C. Wadhwa, IPS, Inspector General of Police and others, Respondents.

## TEXT

M. M. Dutt, J.:—This appeal by special leave has been preferred by the State of Haryana against the judgement of the Division Bench of the High Court of Punjab & Haryana whereby the Division Bench has set aside the judgement of a learned single Judge of the High Court dismissing the writ petition of the respondent Shri P.C. Wadhwa, a member of the Indian Police Service, who was the Inspector General of Police, Haryana, from June 1979 to July 25, 1980.

2. It appears that certain adverse remarks were made by the Home Secretary to the Government of Hary-

ana against Shri Wadhwa, the Inspector General of Police for the said period. The adverse remarks were duly accepted by the competent authority under the All-India Services (Confidential Rolls) Rules, 1970, hereinafter referred to as the Rules'. After such acceptance, the adverse remarks were communicated to Shri Wadhwa by the Home Secretary by his letter dated May 4, 1982, about two years three months after the close of the relevant period on March 31, 1980. The respondent did not make any representation against the adverse remarks to the reviewing authority under the



Rules. Instead, he chose to file a writ petition before the Punjab & Haryana High Court challenging the authority of the Home Secretary to write a confidential report assessing the performances, character, conduct and qualities of the respondent at the Inspector General of Police and prayed for the quashing of such report or adverse remarks.

3. A learned single Judge of the High Court took the view that as the Home Secretary was specifically empowered by the State Government as the reporting authority under Rule 2 (e) of the Rules, he had the authority to write the report or to make adverse remarks against the performances of Inspector General of Police, Haryana. In that view of the matter, the learned single Judge dismissed the writ petition. Being aggrieved by judgement of the learned single Judge, the respondent filed an appeal against the same to the Division Bench of the High Court and, as stated already, the Division Bench set aside judgement of the learned single Judge and allowed the writ petition holding, inter alia, that the Home Secretary had no authority to submit any report against the performances of the respondent for the aforesaid period during which he was the Inspector General of Police, Haryana. Hence this appeal by special leave by the State of Haryana.

4. The only point that is involved in this appeal is whether the State Government was justified in specifically empowering the Home Secretary as the

reporting authority for the purpose of writing a confidential report in respect of the Inspector General of Police. Section 3 of the All-India Services Act, 1951 empowers the Central Government to make rules for the regulation of recruitment, and the conditions of services of persons appointed to an All-India Service. By virtue of Section 3, the Central Government framed the Rules. Under Rules 1 (3), the Rules shall apply to the writing and the maintenance of the confidential reports of the members of the Service clauses (f) and (a) of Rules 2 of the Rules as follows:—

“2. Definitions—In these rules, unless the context otherwise requires:—

... ..

(e) ‘reporting authority’ means the authority who was, during the period for which the confidential report is written, immediately superior to the member of the Service and such other authority as may be specifically empowered in this behalf by the Government;

(f) ‘reviewing authority’ means the authority who was, during the period for which the confidential report is written, immediately superior to the reporting authority and such other authority as may be specifically empowered in this behalf by the Government;

(a) ‘accepting authority’ means the authority who was, during the period for which the confidential report is written, immediately superior to the reviewing authority and such other authority as may be specifically empowered in



behalf by the Government;"

5. In this connection, it may be pointed out that it is not disputed that conjunction 'and' occurring in clause (e), (f) and (a) should be read as 'or'. Under clause (e), the 'reporting authority' may be either immediately superior to the member of the Service or such other authority as may be specifically empowered in this behalf by the Government. The expression 'immediately superior' obviously indicates that the reporting authority should be the immediate superior officer in the same Service to which the member of the Service belongs. The position is the same as in the cases of 'reviewing authority' and 'accepting authority'. So, under the first part of clause (e), the reporting authority of the respondent could be any person who is immediately superior to him in the Police Service. At this stage, it is necessary to refer to Sections 3 and 4 of the Police Act, 1861. Sections 3 and 4 are as follows :—

"Section 3. The superintendence of the police throughout a general police-district shall vest in and shall be exercised by the State Government in which such district is subordinate; and except as authorized under provisions of this Act, no person, officer, or Court shall be empowered by the State Government to supersede, or control any police functionary."

"Sections 4. The administration of the police throughout a general police-district shall be vested in an officer to be styled the Inspector-

General of Police, and in such Deputy Inspector-General and Assistant Inspectors. General as to the State Government shall deem fit.

The administration of the police throughout the local jurisdiction of the Magistrate of the district shall, under the general control and direction of such Magistrate, be vested in a District Superintendent and such Assistant District Superintendents as the State Government shall consider necessary.

6. It is clear from Sections 3 and 4 that the administration of the police throughout a general police district shall be vested in the Inspector General of police. The position and status of the Inspector General of Police have been described in Rule 1.2 of the Punjab Police Rules, 1934, Volume I. Rule 1.2 provides as follows :—

"Rule 1.2. The responsibility for the command of the police force, its recruitment, discipline, internal economy and administration throughout the general police district vests in the Inspector General of Police. He is head of the Police Department, and is responsible for its direction and control and for advising the Provincial Government in all matters connected with it. In the discharge of his duties as Inspector-General and in the execution of order of Government he is bound to act in conformity with the system and regulations regarding the functions, discipline and administration of the force contained in the Police Act (V. of 1861) and in these rules. Orders of the



Provincial Government affecting the Police force, in whole or in part, will be issued through him.

Inspector-General is assisted in the control and administration of the police force by such number of Deputy Inspectors-General and Assistant Inspector-General as the Provincial Government may from time to time appoint."

7. Under Rule 1.2. the Inspector General of Police is the head of the Police Department and is responsible for its direction and control and for advising the Provincial Government in all matters connected with it. Thus, the Inspector General of Police being the head of the Police Department, there is no immediately superior officer to him in the Police Service, consequently, the first part of clause (e) will not have any application to the respondent.

8. Now the question is whether State Government can specifically empower any authority to be the reporting authority of the Inspector General of Police under the second part of clause (e). Apart from any legal provision it is just and proper that a reporting authority must be a person to whom the member of the Service is answerable for his performances. In other words, the reporting authority should be a person higher in rank than the member of the Service. Indeed, that is apparent from the first part of clause (e). It is true that under the second part of clause (e), there is no indication as to the status and position of the authority who may be specifically empowered by the Government

as the reporting authority, but from the point of view of propriety and reasonableness and having regard to the intention behind the rule which is manifest, such an authority must be one superior in rank to the member of the Service concerned. If that be not so there will be an apparent conflict between the first part and second part of clause (e). We are, therefore of the view that the State Government can specifically empower only such authority as the reporting authority as is superior in rank to the Inspector General of Police.

9. It is, however, submitted by Mr. Nariman, learned Counsel appearing on behalf of the State of Haryana, that the Home Secretary is the head of the Police Department under the Business of the Haryana Government (Allocation) Rules, 1974, hereinafter referred to as the Business Rules. The Business Rules have been framed by the Haryana Government in exercise of the power conferred by clauses (2) and (3) of Article 166 of the Constitution of India. Rules 1 to 4 of the Business Rules are as follows: —

"1. These rules may be called the Business of the Haryana Government (Allocation) Rules, 1974.

2. The Business of the Government of the State of Haryana shall be transacted in the Departments specified in the Schedule annexed to these rules and shall be classified and distributed among those Departments as laid down therein.

3. The Governor shall, on the advice of the Chief Minister, allot



ing the Ministers the business of Government by assigning one or more departments to the Charge of a Minister.

Provided that nothing in this rule prevent the assigning of one Department to the charge of more than one Minister.

4. Each Department of the Secretariat to the Government, who shall be the official head of that Department, may employ such other officers and servants subordinate to him as the State Government may determine;

Provided that :—

(a) more than one Department may be placed in charge of the same Department Secretary; and

(b) the work of a Department may be divided between two or more Secretaries."

10. Rule 2 provides inter alia that the business of the Government of the State of Haryana shall be transacted in the Departments specified in the Schedule. Under rule 4 each Department of the Secretariat shall have a Secretary to the Government, who shall be the official head of that Department. In the Schedule to the Business Rules, Item No. 17 under the Department inter alia relates to Police, Railway police and P. A. P." The reliance has been placed by the learned Counsel for the State of Haryana on rule 4 read with Item No. 17. It is submitted by him that the Secretary being the head of the Department and as the Police

Department has been placed under the Department, the Home Secretary must necessarily be the head of the Police Department. We are unable to accept this contention. The Business Rules have been framed under clauses (2) and (3) of Article 166 of the Constitution for the more convenient transaction of the business of the Government of Haryana and for the allocation of business among the Ministers. Under Rule 4, the Secretary of each Department of the Secretariat is the head of that Department. Thus, the Secretary of the Home Department is the head of the Home Department being a Department of the Secretariat; but merely because he has to conduct the business, on behalf of the Government, of the Police Department, he does not thereby become the head of the Police Department. Item No. 37 under the General Administration Department in the Schedule relates to Judges of the High Court and officers of the Superior Judicial Service. The Chief of the Government of Haryana is the head of the General Administration Department by virtue of Rule 4 of the Business Rules. But that does not mean that the Chief Secretary is also the head of the Administration relating to the Judges of the High Court and officers of the Superior Judicial Service. Similarly, Item No. 21 of the General Administration Department relates to Council of Ministers and its Committees. Surely, the Chief Secretary has no authority whatsoever on the Council of Ministers and its Committees. There is, therefore, no substance in the conten-



tion made on behalf of the appellant that as police, Railway police and P.A.-P. have been placed under the Home Department, the Secretary of the Home Department is the head of the Police Department by virtue of Rule 4 of the Business Rules. The Rules of Business that have been framed under Article 166 cannot override the provisions of the Act or any statutory rules. Indeed, the Business Rules also do not attempt to override Rule 12 of the Punjab Police Rules, for it cannot. There is much substance in the contention made by the respondent appearing in person and Mr. Garg, learned Counsel appearing on behalf of the intervenor, the IPC Officers' Association, that the Business Rules framed under Article 166 cannot be relied upon for the purpose of interpreting the provision of clause (e) of Rule 2 of the Rules.

11. In view of sections 3 and 4 of the Police Act read with Rule 12 of the Punjab Police Rules, the Inspector General of Police, Haryana, is the head of the Police Department.

The immediate authority superior to the Inspector General of Police is the Minister-in-Charge of the Police Department. The only authority who could be specifically empowered as the reporting authority in regard to the Inspector General of Police under clause (e) of Rule 2 of the Rules is the Minister-in-charge and the Chief Minister, being superior to the Minister-in-Charge, may be the reviewing authority under clause (f) of Rule 2. In acting

as the reporting authority the Minister-in-Charge may be assisted by the Home Secretary, but the confidential report relating to the performances of the Inspector General of Police has to be written by the Minister-in-Charge. The Minister-in-Charge of the Police Department is supposed to be aware of the performances of the Inspector of Police. As the Chief Minister is the reviewing authority, he will also act as the accepting authority on the basis of the principle as laid down under Rule 12 of the Rules providing that where the accepting authority writes or reviews the confidential report of any member of the Service, it shall not be further necessary to review or accept any such report. In other words, the Chief Minister will act both as the reviewing authority writes or reviews the confidential report of any member of the Service, it shall not be further necessary to review or accept any such report. In other words, the Chief Minister will act both as the reviewing authority and the accepting authority.

12. In this connection, we may notice the statements made in the writ petition filed by the respondent in the High Court of Punjab & Haryana. It has been stated in paragraph 10 that reports of the work and conduct of the various secretaries to the Government are written and recorded by the Minister-in-Charge of the Department concerned and not even by the Chief Secretary so that the Minister-in-Charge of the Departments concerned are



'immediate superior' authorities the Secretaries concerned within the meaning of Rule 2(e) of the Rules. Further, it has been stated that before independence the report on the work and conduct of the Inspector General of Police, Punjab, was being recorded by the Minister-in-charge of the Department and such a position continued even after the independence till 1974 when the Haryana state Government passed the order dated May 3, 1974 under clause (e) of Rule 2 of the Rules, inter alia, specifically empowering the Home Secretary as the reporting authority for writing out the confidential reports in regard to the Inspector General of Police, Haryana. The statements made in paragraph 14 have not been denied by the State of Haryana in its counter-affidavit filed in the High Court. The Division Bench of the Court was, therefore, perfectly justified in quashing the confidential report written by the then Home Secretary to the work and conduct of the respondent Shri Wadhwa.

13. Before we part with this appeal, we may dispose of another contention of the respondent about the delay in communicating to him the impugned adverse remarks. Under Rule 5 of the Rules, a confidential report assessing the performances, character, conduct and qualities of every member of the service shall be written for each financial or calendar year, as may be specified by the Government, ordinarily within two months of the close of the said year. Rule 6 provides that the

confidential report shall be reviewed by the reviewing authority ordinarily within one month of its being written. Under Rule 6A, the Confidential report, after review, shall be accepted with such modification as may be considered necessary, and countersigned by the accepting authority, ordinarily within one month of its review. Thus, the whole process from the writing of the confidential report to the acceptance thereof has to be completed ordinarily within a maximum period of four months. Further, under Rule 7 the adverse remarks, if any, in a confidential report shall be communicated to the officer concerned within three months of the receipt of the confidential report. Thus, a total period of seven months has been laid down as the maximum period within which adverse remarks, if any, has to be communicated to the officer concerned. It has been already noticed that the adverse remarks were sent to the respondent after two years three months, that is, after twenty seven months of the close of the year. It is submitted by the respondent that in view of the delayed communication, the adverse remarks lost all importance and should be struck down on that ground.

14. The whole object of the making and communication of adverse remarks is to give to the officer concerned an opportunity to improve his performances, conduct or character as the case may be. The adverse remarks should not be understood in terms of punishment, but really it should be taken as



an advice to the officer concerned, so that he can act in accordance with the advice and improve his service career. The whole object of the making of adverse remarks would be lost if they are communicated to the officer concerned after an inordinate delay. In the instant case, it was communicated to the respondent after twenty seven months. It is true that the provisions of Rules 5, 6, 6A and 7 are directory and not mandatory, but that does not be complied with even substantially. Such provisions may not be complied with strictly and substantial compliance will be sufficient. But, where compliance after an inordinate delay would be against the spirit and object of the directory provision, such compliance would not be substantial compliance. In the instant case, while the provisions of Rules 5, 6, 6A and 7 require that everything

including the communication of the adverse remarks should be complete within a period of seven months, this period cannot be stretched to twenty seven months, simply because these Rules are directory, with no serving any purpose consistent with the spirit and objectives of these Rules. We need not, however, dilate upon the question any more and consider whether on the ground of inordinate and unreasonable delay, the adverse remarks against the respondent should be struck down or not, and suffice it to say that we do not approve of the inordinate delay made in communicating the adverse remarks to the respondent.

15. For the reasons aforesaid, this appeal is dismissed. There will, however, be no order as to costs.

Appeal dismissed.



O. Chinnappa Reddy  
Judge  
Supreme Court of India

### OBSERVATION

(A) **Employment Exchanges (Compulsory Notification of Vacancies) Act of 1959), Pre., S. 2 (f)—Scope—Definition of “establishment in public sector includes Govt offices also—Act is applicable to Govt. establishments. 1986 1C 182 (Andh Pra) Reversed.**

(B) **Employment Exchange (Compulsory Notification of Vacancies) Act 31 of 1959), Pre, S. 4(4)—Scope—Act does not oblige any employer to employ those persons only who have been sponsored by employment exchanges. Constitution of India, Art. 73).**

(C) **Employment Exchanges (Compulsory Notification of Vacancies) Act of 1959), Pre., ss. 2, 4—Scope—Employment in Govt. Departments—any restrictions that it should be through medium of employment exchanges Does not offend Arts. 14 and 16 (Constitution of India, Arts. 14, 16)**

### OBSERVED BY

Mr. O. Chinnappa Reddy And Mr. Murari Mohan Dutt,  
Hon'ble Judges, Supreme Court of India.

### IN

Civil Appeals nos. 9-15 of 1986 (With Spl. Leave Petn. (Civil) No. 4517 of 1986) with Civil Misc. Petns. Nos. 4026-27, 5558 and Writ Petn. No. 1183 of 1986), decided 13-4-1987, in the case of Union of India and others, etc., Appellants v. N. Hargopal and others, etc., Respondents.

### TEXT

Chinnappa Reddy, J. : —The question raised in these appeals is whether ‘establishment in the public sector’ means an ‘establishment in the private sector’, as defined in the Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959 may make appointments to posts to which the Act applies, of persons not sponsored by the employment Exchanges? A further question is whether the Act covers Government establishments also? A Division Bench of the High Court of Andhra Pradesh has held that the Act has no

application to Government establishments, that the Act casts no obligation either on the public sector establishment or on the private sector establishment to make the appointments from among candidates sponsored by the employment exchanges only and that any insistence that candidates sponsored by the employment exchanges alone should be appointed would be contrary to the right guaranteed by Arts. 14 and 16 of the Constitution. The learned Additional Solicitor General appearing for the Union of India argued that the



object and the scheme of the Employment Exchanges (Compulsory Notification of Vacancies) Act and the instructions issued by the Government of India from time to time left no option to the employers but to confine their field of choice to candidates sponsored by the employment exchanges. It was argued that such insistence that appointments should be made from candidates sponsored by the employment exchanges only did not offend Arts. 14 and 16 of the Constitution. He also argued that the Act was applicable to Government Establishments also.

2. We may refer to the provisions of the Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959 without further ado. The title of Act itself suggests that the compulsion is in regard to notifying of vacancies only and nothing more. The preamble to the Act, like the title of the Act, also does not suggest any compulsion in the making of appointments, but only in the notifying of vacancies. The preamble says "An Act to provide for the compulsory notification of vacancies to employment exchanges." Section 2(e), (f) and (g) defines "establishment", "establishment in public sector" and "establishment in private sector" as follows :

"(e) 'establishment' means--

(a) any office or

(b) any place where any industry, trade, business or occupation is carried on;

(f) "establishment in public sector" means an establishment owned, contro-

led or managed by--

(1) the Government or a department of the Government ;

(2) A Government company as defined in S. 617 of the Companies Act, 1956 ;

(3) A corporation (including a cooperative society) established by or under a Central Provincial or State Act, which is owned, controlled or managed by the Government;

(4) A local authority,

(g) 'Establishment in private sector' means an establishment which is not an establishment in public sector and where ordinarily twenty five or more persons are employed to work for remuneration.

The High Court thought that the definition of "establishment in public sector" as meaning an establishment owned, controlled or managed by the Government or a Department of the Government indicated that an establishment in public was something different from the Government or a Department of Government and did not include the Government or Department or Department of the Government. It had to be something which could be owned, controlled or managed by the Government or a managed by the Government. The High Court also thought that the expression 'public sector' was used in contradiction to 'private sector' and that it could not include offices of the Government. The expression would only take in an agency or instrumentalite of the State, but not the State itself. We are unable to agree with the conclusion of the High Court



this part of the case. If the definition 'establishment' which includes an 'office' is read alongside the definition 'establishment in public sector', it will be clear that Government offices are also included in the expression 'establishment in public sector'. That is the interpretation which the Government is advancing before us and that is how the Government has always understood the provision during these several decades as will be evident from the instructions issued by the Government from time to time to which we will be referring later in the course of our judgement. We are unable to agree with the view of the High Court that the Act is not applicable to Government establishments.

3. Section 3 of the Act specifies posts, vacancies to which the Act does not apply. Section 4 provides for the notification of vacancies to employment exchanges: It is desirable to extract the substance of S. 4 which is as follows:—

"4. (1) After the commencement of this Act in any State or area thereof, every employer in every establishment in the public sector in that State or area shall, before filling up any vacancy in any employment in that establishment notify such vacancy to such employment exchange as may be prescribed.

(2) The appropriate Government may, by notification in the Official Gazette, require that from such date as may be specified in the notification, every employer in every establishment in the private sector or every establishment pertaining to any class or category of

establishments in private sector shall, before filling up any vacancy in any employment in that establishment notify such vacancy to such employment exchange as may be prescribed, and the employer shall thereupon comply with such requisition.

(3). The manner in which the vacancies referred to in sub-s (1) or sub-s (2) shall be notified to the employment exchange and the particulars of employments in which such vacancies have occurred or are about to occur shall be such as may be prescribed.

(4) Nothing in sub-ss. (1) and (2) shall be deemed to impose any obligation upon any employer to recruit any person through the employment exchanges to fill any vacancy merely because that vacancy has been notified under any of the sub-section." Section 5 deals with the duty of the employees to furnish information and returns in prescribed forms. Section 6 provides for official access to records and documents. Section 7 provides for penalties. Section 8 deals with cognizance of offences. Section 9 provides for protection of action taken in good faith. Section 10 vests the rule-making power in Central Government.

4. It is evident that there is no provision in the Act which obliges an employer to make appointments through the agency of the employment exchanges. Far from it. Section 4 (4) of the Act, on the other hand makes it explicitly clear that the employer is under no obligation to recruit any per-



son through the employment exchange to fill in a vacancy merely because that vacancy has been notified under S. 4 (1) or S. 4 (2). In the face of S. 4 (4), we consider it utterly futile for the learned Additional Solicitor General to argue that the Act imposes any obligation on the employers apart from notifying the vacancies to the employment exchanges. The learned Additional Solicitor General invited our attention to the speech of the Minister of Labour and Employment and Planning (Shri Nanda) made at the time of the introduction of the Employment Exchanges (Compulsory Notification of Vacancies) Bill. Far from being of any assistance to the learned Additional Solicitor General, the speech appears to be against his submission. In his speech, the Minister quoted from the report of the Training and Employment Services Organisation Committee and observed that the recommendation of the Committee offered a full explanation of the provisions of the Bill. The recommendation of the Committee which he quoted was, "Though we have not, for the present, recommended compulsion on private employers to recruit through the employment exchanges, we recommend that they be required on a compulsory basis to notify to the exchanges all vacancies, other than vacancies for unskilled categories, vacancies of very temporary duration and vacancies proposed to be filled through promotion." The Minister further said. The main thing is that an obligation is being placed

that after this legislation becomes operative, from that date, the employer in every establishment in the public sector shall, before filling up any vacancy in any employment in that establishment, notify that vacancy to such employment exchanges as may be prescribed. And so far as the private sector is concerned, there is the further qualification that the Government concern may specify by notification that the employer in every establishment in private sector or every establishment pertaining to any class or category of establishment in private sector shall, before filling up any vacancy in any employment in that establishment, notify that vacancy to such employment exchanges as may be prescribed. This is the kernel of this provision. This is the main object that is, an obligation placed on the employer to notify the vacancies that may occur in their establishment before filling these vacancies." The Minister was conscious that there was a likelihood of the Bill being misunderstood as compelling the employers to make appointments through the employment exchanges only. He clarified the position saying. "The misunderstanding is this Bill gives power to the Government to compel the employers to recruit only such persons as are submitted by the employment exchanges. That is not so. This compulsion extends only to notification of vacancies. Naturally the employer has to consider the names which are submitted



the employment exchanges but there is no compulsion that they must restrict the choice only to the least that is submitted to them. Of course, there is also the objection from the other side that it may not go far enough. We believe that even this will make things very much better. In any case, when the Committee reported, they also suggested this much in advance. At present, they said, we should have only compulsory notification, but not compel the employers to recruit only out of the least that is sent by the employment exchanges."

5. As we said the speech of the Minister, at the time of the introduction of the Bill, is totally destructive of the contention of the learned Additional Solicitor General that the employers are under an obligation to recruit persons for appointment through employment exchanges only. The learned Additional Solicitor General requested us to give a purposive interpretation to the provisions of the Act and insist that employers, in making appointments, should restrict their field of choice to candidates sponsored by the employment exchanges. We are unable to appreciate the argument since there is no provision of the Act which requires interpretation by us and which we may reasonably interpret as compelling the employer to appoint persons sponsored by the employment exchanges. On the other hand, we have already referred to S. 4 (4) which is explicit that there is no such obligation on the part of the employer. We

also notice that the object of the Act, is not to restrict the field of choice in any particular manner but to enlarge the field of choice. That is why in his introductory speech, the Minister said." .....a large number of employers, particularly in similar industrial establishments and in construction works, do not employ any scientific method, but depend for their supply of labour on agents or recruit in a haphazard manner from those assembled at factory gates or at works sites. The methods adopted are not always dictated by a consideration of efficient service, but as more a matter of bestowing patronage and favour. These applies in varying degrees to a larger number of employers."

The minister discussed the existing position and anticipated position in the following words :—

"The Act of notification of vacancies has important consequences. In the first place, so far as the employer is concerned, he will be placed in a position to have a much wider choice for the purpose of selection. Now, what is the present position? Any person knocks at the gate of the factory or the mill or other establishment and from those few who are there choose. Now it would be possible for them to have a wider area of selection. The names of so many others who may not be able to go and knock at every gate can be submitted and out of them, the best can be selected. So far as the quoting of selection is concerned, it should imp-



rove because of the wider range of choice. On the side of the worker certainly it means a more equitable distribution of employment opportunities. It should not be necessary for a person to be all the day moving from place to place. It should be sufficient for him to register at a place, give all the particulars about his qualifications and then he should be sure that at any rate, his name will be considered along with other names and there will be some regard for fitness in the choice of people who enter these new places for employment."

6. It is, therefore, clear that the object of the Act is not to restrict but to enlarge the field of choice so that the employer may choose the best and the most efficient and provide an opportunity to the worker to have his claim for appointment considered without the worker having to knock at every door for employment. We are, therefore, firmly of the view that the Act does not oblige any employer to employ those persons only who have been sponsored by the employment exchanges.

7. The next question for consideration is whether the instructions issued by the Government from time to time have the effect of compelling the employers to restrict their field of choice to candidates sponsored by the employment exchanges. We may straightway refer to some of the instructions on which reliance was placed by the learned

Additional Solicitor General. In O. M. No. 14/11/64- Estt (D) dated March 21, 1964, the Ministry of Home Affairs addressed all the ministries regarding recruitment of staff through the agency of the National Employment Service and the utilisation of employment exchanges by quasi government institutions and statutory organisations. It is enough if we extract paragraphs 1, 4 and 5 of this communication which are as follows:—

"1. The undersigned is directed to say that in paragraph 6 of this Ministry's Office Memorandum No. 71/40-DGS (Apptts) dated the 11th December, 1949 (copy enclosed) it was laid down that all vacancies in central Government Establishments, other than those filled through the Union Public Service Commission should be notified to the nearest employment exchange and that no Department or office should fill any vacancy by direct recruitment unless the employment exchanges certified that they were unable to supply suitable candidates. Subsequently in this Ministry's Office Memorandum Nos. 71/49-DGS (Apptts) dated 30th January, 1951 and 71/222/56-CS (C) dated the 14th December, 1956 (copy enclosed). The Ministry of Finance etc. were requested to issue immediate instructions to all quasi-Government institutions and statutory organisations with which they were concerned asking them to fall in line, as far as possible, with the Central Government establishments in the matter of recruitments, by suitably



ling their recruitment rules or  
ng resolutions to achieve this  
if necessary. The Ministries  
also requested to impress upon  
institutions that it was in their  
interest as well as in the interest of  
country as a whole that recruitment  
d be made through the employment  
nges, as a large number of experie-  
and trained hands were available  
their registers and the need for  
ng other sources of recruitment  
d arise only if the employment  
nge has certified that they were  
e to nominate suitable recruits  
their registers.....

. Under the EE(CNV) Act,  
ment of staff through the employ-  
service is voluntary so far as the  
e sector is concerned. Even, so,  
s are made by the employment  
e to persuade the private sector to  
t candidates sponsored by the  
yment exchanges. The Directorate  
ral of Employment and Training  
aced in a very embarrassing situ-  
when they have to approach the  
Governments and establishments  
private sector utilise the employ-  
service in filling up the vacancies,  
some establishments in the public  
do not recognise the Employment  
e as the normal channel of reruit-

. It is accordingly requested  
he Ministry of Finance etc., may  
instructions to all quasi-Govern-  
institutions and statutory organisa-  
with which they are concerned

requiring them to notify vacancies  
in the manner and form prescribed  
in R. 4 of the EE (CNV) Rules, 1960  
to the prescribed employment exchange  
and to fall in line with the Central  
Government Departments in the recruit-  
ment of staff through the agency of the  
employment service. The need for issu-  
ing advertisements for inviting applica-  
tions or tapping other sources of recruit-  
ment should be considered only if the  
employment exchanges issue non-availa-  
bility certificates. A copy of the inst-  
ructions issued by the Ministry of  
Finance etc., may kindly be endorsed  
to the Ministry of Home Affairs and  
the Directorate General of Employment  
and Training."

It will be noticed that in order to  
give effect to such instructions in the  
case of quasi-Government institutions  
and statutory organisations, it would  
be necessary to suitably amend the  
recruitment rules or adopt resolutions  
to achieve that object. This is so men-  
tioned in para 1. In Office Memoran-  
dum No. 14/22.65-Estt. (D) dated June  
12, 1968, the Ministry of Home Affairs  
informed all the other Ministries;

"The undersigned is directed to say  
that in paragraph 6 of this Ministry's  
O.M. No. 71/49/DGS (Apptt) dated  
the 11th December, 1949, it was laid  
down that all vacancies in Central  
Government Establishment, other than  
those filled through the Union Public  
Service Commission, should be notified  
to the nearest employment exchange  
that no Department or Office should  
fill any vacancy direct recruitment



unless the employment exchange certified that they were unable to supply candidates."

8. In Office Memorandum No. 14024/2/77-Estt. (D) dated April 12, 1977, the Department of Personnel addressed all the Ministries/Departments and said.

"As the Ministry of Agriculture and Irrigation, etc. are aware, in accordance with the instructions issued by the Central Government (vide marginally-noted communications), all vacancies arising under Central Government Offices/establishments (including quasi-Government institutions and statutory organisations), irrespective of the nature and duration (other than those filled through the Union public Service Commission), are not only to be notified to, but also to be filled through, the Employment Exchange alone and other permissible sources of recruitment can be tapped only if the Employment Exchange concerned issued a 'non-availability' certificate. There can be no departure from this recruitment procedure unless a different arrangement in this regard has been previously agreed to in consultation with this Department and the Ministry of Labour (Directorate General of Employment and Training). Similar instructions are also in force requiring vacancies against posts carrying a basic salary of less than Rs. 500/- p. m. in Central Public Employment Exchanges."

9. It is clear that it is the desire of the Government of India that all Government Departments, Govern-

ment Organisation and statutory bodies should adhere to the rule that not merely vacancies should be notified to the employment exchanges, but vacancies should also be filled by candidates sponsored by the employment exchanges. It was only when no suitable candidates were available, that other sources of recruitment were to be considered. While the Government is at perfect liberty to issue instructions to its own departments and organisations provided the instructions do not contravene any constitutional provision or any statute, the instructions cannot bind other bodies which are created by statute and which function under the authority of statute. In the absence of any statutory provision the statutory authority may however adopt and follow such instructions if it thinks fit. Otherwise, the Government may not compel statutory bodies to make appointments of persons from among candidates sponsored by employment exchanges only. The question of course, does not arise in the case of private employers which cannot be compelled by any instructions issued by the Government.

10. The further question is whether the instructions issued by the Government that in the case of Government Departments the field of choice should in the first instance, be restricted to candidates sponsored by the employment exchanges offend Arts. 14 and 16 of the Constitution. Shri P. P. Meshwar Rao, learned counsel appearing for some of the respondents



**O. Chinnappa Reddy**  
**Judge**  
**Supreme Court of India**

ously urged that such a restriction would offend the equality clauses of the Constitution, namely, Arts. 14

16. He urged that when Parliament had gone into the question and decided that there should be no compulsion in the matter of appointment by way of restriction of the field of choice, it was not open to the Government to impose such compulsion. He said that it would be unreasonable to restrict the field of choice to employment sponsored by the employment exchanges. In a country so vast as there is in a country where there is so much poverty, illiteracy and ignorance, it is not right that employment opportunities should necessarily be channelled through the employment exchanges when it is not shown that the network of employment exchanges is so wide that it reaches all the corners of this vast country. He argued that it is futile to expect that persons in distant places could get themselves registered with employment exchanges situated far away. The submission of Shri Parmeshwara Rao is indeed appealing and attractive. Nonetheless, we are afraid we cannot uphold it. The object of recruitment to service or post is to secure the most suitable person who answers the demands of the requirements of the service. In the case of public employment, it is necessary to eliminate arbitrariness

and favouritism and introduce uniformity of standards and orderliness in the matter of employment. There has to be an element of procedural fairness in recruitment. If a public employer chooses to receive applications of employment where and when he pleases, and chooses to make appointments as he likes, a grave element of arbitrariness is certainly introduced. This must necessarily be avoided if Arts. 14 and 16 have to be given any meaning. We, therefore, consider that insistence of recruitment through employment exchanges advances rather than restricts the rights guaranteed by Arts. 14 and 16 of the Constitution. The submission that employment exchanges do not reach everywhere applies equally to whatever method of advertising vacancies is adopted. Advertisement in the daily Press, for example, is also equally ineffective as it does not reach everyone desiring employment. In the absence of a better method of recruitment, we think that any restriction that employment in Government Department should be through the medium of employment exchanges does not offend Arts. 14 and 16 of the Constitution. With this modification of the judgement of the High Court, the appeals and the special leave petitions are disposed of. No orders are necessary in the writ petition.

order accordingly



IT IS THE ESSENCE OF DEMOCRACY  
TO OBEY  
NO MASTER BUT THE LAW



## OBSERVATION

iminal P.C. (2 of 1974), Ss. 353, 354, 482, —Judgement—Disparaging remarks of court before making such remarks. Judgment of Kerala H. C. (Civil P. C. (5 of 1908) (O. 20 R. 4).

## OBSERVED BY

Mr. B. C. Ray and  
 Mr. S. Natarajan  
 Hon'ble Judges, Supreme Court of India.

## IN

iminal Appeal No. 109 of 1987, (arising out of SLP (Cri) No. 2666 of 1986), decided on 3-3-1987, in the case of S. K. Viswambaran, Appellant v. E. Koyakunju and Respondents.

## TEXT

Natarajan J. :—This appeal by leave is by Gazetted Police to seek expunction of certain remarks passed against him High Court of Kerala in an order with reference to two Miscellaneous petitions filed by respondents 2 and 3 herein without issuing notice to him and without hearing

The somewhat unusual circumstances in which the appellant has been the victim of strictures by the High Court may now be looked into. One Prasekaran Pillai residing within the jurisdiction of Karunagapally Police Station was charged under S. 302, I.P.C., for having committed the murder of his wife Komalavalli by first beating her and kicking her and then hanging her in order that it appear that it was a case of suicide. The accused's son aged about 15 years and a neighbour claimed to have

witnessed the beating as well as the accused dragging the deceased to the western side of the house. A little later the son made bold to go into the house and found his mother hanging with a noose round her neck. He raised alarm and the neighbours including his maternal uncle came to the house and cut the rope and rendered first aid unsuccessfully because Komalavalli had already died.

3. A report was given at Karunagapally Police Station and a case of "suspicious death" was registered and investigation was done by Shri T. P. Rajagopalan, Inspector of Police (respondent 2) who was examined as P. W. 16 in the sessions Trial against the accused. As the brother of deceased Komalavalli was not satisfied with the manner of investigation of the local police he filed a petition before the



Deputy Inspector General, Southern range. Under orders of the Deputy Inspector General the investigation was entrusted to the Crime Detachment in which the appellant was serving as a Deputy Supdt. of Police. The appellant took charge of the case and his investigation revealed that Komalavalli's death was due to homicide and not suicide. The appellant was in charge of the investigation of the case only from 26-1-1980 to 5-1-1981 and thereafter the further investigation was done by another police officer of the Crime Detachment who was examined as P. W. 18 in the trial. The charge sheet was eventually filed by yet another officer viz., P W. 19 an Inspector of Police.

4. The defence of the accused was that his wife Komalavalli had committed suicide and that he had not murdered her. In support of his defence the accused placed reliance upon the first investigating Officer, viz., P W. 16 carrying out a cellophone tape test on the palms of Komalavalli and sending the cellophone tapes to the Forensic Science Laboratory to find out whether any fibres of coir rope were found in the cellophone tape and if so whether the fibres had come out of the coir rope used for hanging. The report of the Forensic Science Laboratory was that the cellophone tape contained fibres of coir which were similar to the coir rope used for the hanging. It was, therefore, contended that Komalavalli's death was due to suicide as otherwise fibres from the coir rope used for hanging would not

have been found in the palms of hands. To prove the despatch of cellophone tapes of the Forensic Science Laboratory and the receipt of the report from the said Laboratory and despatch to the Crime Detachment Head Constable of Karunagapally Police Station by name E. Koyakunju (respondent 1) was examined as Defence Witness No. 2.

5 The Session Judge entertained serious doubts about P. W. 16 carrying out the cellophone tape test to lift fibres of coir sticking to the palms of Komalavalli and sending the tapes to Forensic Science Laboratory and bona fides of the exercise. We shall set out later the numerous suspicious features noticed by the Sessions Judge regarding the conduct of P. W. 2 with reference to the carrying out of the cellophone tape test and the despatch of the tapes to the Forensic Science Laboratory and the entrustment of the report to the Crime Detachment. For the present we will continue with the narrative as to make known the circumstances which have led to the filing of this appeal.

6. After evaluating the prosecution evidence the Session Judge held that the prosecution had failed to prove the case against the accused beyond reasonable doubt and, therefore, granted him the benefit of doubt and acquitted him of the charge under S 302, I. C. It is significant to note that the acquittal was not rendered in accordance of the defence case that Komalavalli had committed suicide but because



Court felt that it would not be safe to act upon the evidence of P. W. 2, the witness and P. W. 3, the neighbour and the victim the accused for the offence of murder.

7. In the course of his judgement the Sessions Judge made severe comments against P. W. 16, the Inspector of Police, D. W. 2, Head Constable and another Police P. C. 2599 and observed as follows :

“Therefore in my view this is a fit case where appropriate action has to be taken against P. W. 16, D. W. 2 and P.C. 2599 who wrote Ext. D14 for the reasons stated earlier. Otherwise indiscipline and the tendency to tamper with official documents and create false documents will set at naught the very purpose of having a police establishment. When one wing of the police establishment tries to investigate properly and book the culprit, P. W. 16, D.W. 2, and P. C. 2599 were trying to neutralise the work that has been done by the same Detachment and to help the accused to get an acquittal. This is a serious situation which the higher authorities in the police department have to take serious notice of and curb the tendency even from the beginning.”

8. Aggrieved by the strictures passed by the Session Judge, the Inspector (P. W. 16) and the Head Constable (D. W. 2) filed criminal Misc Petitions before the High Court of Kerala for quashing the adverse remarks made against them. A learned single Judge of the High Court, without making any

examination of the conduct of the petitioners before him and without considering whether the featurer noticed by the Sessions Judge warranted the adverse remarks or not went at a tangent and the appellant in the dock for having failed to place before the Court the scientific materials which P. W. 16 had obtained in the course of investigation to find out whether Komalavalli's death was due to suicide or homicide. The learned Judge had taken it for granted that P. W. 16 and D. W. 2 had acted in a blemishless manner and that the report of the Forensic Science Laboratory had been obtained through bona fide investigative process and it was the appellant who had schemingly kept back the crucial records from the notice of the Court in order to secure a conviction unjustly against the accused and as such the appellant should be reprimanded in no uncertain terms. The relevant portions in the judgement where the appellant who was examined as P.W. 17 in the Sessions Trial has been criticised are as under :—

“(para 6.) P. W. 17, Dy. S. P., who conducted the investigation kept the above facts concealed purposely. If the report sent by the Assistant Director of Forensic Science Laboratory was made available to the court it would have gone a long way to establish innocence of the accused. So to foist a false case of murder on the account he did not send the report of the Assistant Director of Forensic Science Laboratory to the Court. He pleaded complete ignorance of the



above examination when examined before court.

The part played by P. W. 17 is not beyond suspicion. He had purposely concealed materials which were favourable to the accused. It would appear that this officer was averse to scientific methods being made use of in investigation of crimes. His attempt was only to see that the accused is convicted in this case. This should not have been the approach of a senior officer like P. W. 17, who was investigating a very serious crime. The life and liberty of innocent persons should not be placed at the mercy of such unscrupulous officers. It will be proper for the higher officers in the department to look into this matter and take proper corrective measures for future guidance."

9. Stung by the remarks made against him without even hearing, the appellant has preferred this appeal to seek expunction of the remarks.

10. Now let us have a look at the distressing and suspicious features noticed by the Sessions Judge in the conduct of P.W. 16 and D. W. 2 in the "cellophone tape test" carried out by them and in obtaining the report of the Forensic Science Laboratory and the despatch of the opinion to the Crime Detachment. The relevant portions extracted from the judgement are as follows :—

(i) The inquest report prepared by this witness (P. W. 16) does not show that he had seized any cellophone tape or coir or that they were sent to the

Forensic Science Laboratory;

(ii) "There are no documents to show that the tape and coir were taken into custody for the purpose of sending them to the Forensic Science Laboratory in the case diary;

(iii) "Normally any material to be examined by the Forensic Science Laboratory will be sent only through the court. Admittedly the cellophone tape and the coir were not sent through court. On the other hand it is stated that they were sent to the laboratory through a constable. But the case diary does not show that any constable was sent to the Forensic Science Laboratory for handing over these articles;

(iv) "P. W. 16 did not prepare any mahazar for seizure of any cellophone tape and inquest report also does not state anything about any tape said to have been affixed by him on the palm of the dead body and taken for the purpose of examination at the laboratory;

(v) "D. W. 1 Assistant Director of the Forensic Science Laboratory. Trivandrum examined by the defence to prove his report Exhibit D. 10 regarding the presence of small bits of coconut fibres bearing similarity to the coir rope that was also sent, had stated in cross examination "that even if the tape was affixed to the coir (instead of the palms) and then sent, it will contain the fibres similar to the one found on the coir;

(vi) "The investigation was taken over by the Crime Detachment on 26-11-1980. The cellophone tapes and the coir pieces are said to have been sent



W. 16 to the laboratory on 1-12-80. He had ceased to be the Investigating Officer;"

vii) "Even if he had taken any cellophone tape and coir pieces at the time of inquest or thereafter and wanted them to be examined by the laboratory in proper course for him would have been to send them to the Dy. S.P. who was investigating the case on 1-12-80."

viii) D.W. 2, Head Constable, was produced and examined by the defence to prove the sending of the cellophone tape and coir to the laboratory and the receipt received from the laboratory was stated "that there is no document at the Police Station to prove that cellophone tape or coir piece were sent to the Karunagapally Police Station to the Forensic Science Laboratory, Madras."

ix) "He further stated that the receipt received from the laboratory was sent to the Crime Detachment on 1-12-81 but claimed that there is nothing to show that it was received by any member of the Crime Detachment Office. The despatch register Ext. D13 only shows that a cover was handed over to the Head Constable for delivery to the Crime Detachment Office. But there is no acknowledgment to show that the constable had actually handed over the same to the office of the Crime Detachment at Madras."

x) "D.W. 2 produced a notebook Ext. D. 14 said to have been maintained by the constable to whom this cover was handed over for delivery at the

office of the Crime Detachment. In this the curious aspect is that the entry regarding this handing over is written in a sheet of paper which is affixed in the note book as an extra sheet.....

This entry Ext. D. 14 has been purposely manufactured for the purpose of this case and I have no doubt that it has been done at the instance of D.W. 2 the Head Constable and P.C. 2599 who wrote Ext. D. 14. Therefore the constable who wrote Ext. D. 14 and DW 2 are equally responsible for this fraud".

(xi) The extent to which DW 2 would go to help the accused is evident from the fact that he voluntarily produced Ext. D. 17."

(xii) "Ext. D. 17 is a letter sent from the Forensic Science Laboratory to the S. I. on 15-11-1980."

This letter states that the sealed packet said to contain the M. Os. involved in Crime 220 of 1980 of Karunagapally Police Station were being returned unopened for want of forwarding note and certificate and hence the sealed packet may be resubmitted with proper forwarding note and certificate. At the bottom of this letter in vernacular it is written "cellophone tape". Except this vernacular writing there is nothing to show that the MOs referred to in Ext. D. 17 were cellophone tape and coir piece.....As the packet sent from the Karunagapally Police Station was not opened, by the Forensic Science Laboratory, the writing in vernacular at the bottom of Ext. D. 17 could not have been written by anybody from the labo-



ratory. It is a subsequent interpolation probably at the instance of D. W. 2. This was also interfering with official documents and tampering with it by D.W. 2 or somebody from the Police Station at Karunagapally.

11. It was with reference to all these features the Sessions judge made his adverse remarks against P. W. 16, D.W. 2 and P.C. 2599 and observed that the conduct of the concerned official was highly open to suspicion, that as such a full-fledged enquiry should be held against them and that "otherwise indiscipline and the tendency to tamper with official documents and create false documents will set at naught the very purpose of having a police establishment."

12. Coming now to the merits of this appeal when P. W. 16 and D.W. 2 moved the High Court for expunging the adverse remarks against them the scope of the enquiry was confined to the bona fides their action in the investigation proceeding and whether the Sessions Judge was justified in drawing adverse inferences against them on the basis of suspicious features catalogued by him. The High Court was not dealing with an appeal against the acquittal of the accused and there was no need or occasion for the High Court to go into the conduct of the appellant. The enquiry in the criminal misc petitions was only touching upon the conduct of P.W. 16 and P.W. 2 and not the conduct of the appellant. Further more one material fact which the High Court had completely overlooked is that

the appellant ceased to be in charge of the case on 5-1-1981. Thereafter the investigation of the case was taken charge of by P.W. 18 and still later by P.W. 19. Even according to D. W. 2 the report from the Forensic science Laboratory was sent to the Crime Data Unit only on 7-1-1981 where the appellant ceased to be in charge of the case on 5-1-1981 itself. It, therefore, passes, one's comprehension to how the appellant can be accused of having wilfully suppressed material documents from the notice of the court in order to secure a conviction unjustly against the accused in a murder case. The High Court, it is surprising to find has not applied its mind to the series of suspicious features noticed by the Sessions Judge to draw an adverse inference against P.W. 16 and D.W. 2 in conducting the so-called cellophone tape test and sending the tape to the Forensic Science Laboratory for its report. The learned judge has taken it for granted that P.W. 16 had actually carried out a cellophone tape test, that in carrying out such a test he was wedded to scientific methods of investigation and that he and DW 2 had acted fairly and squarely in trying to find out the real cause of death of Komalavalli and that it was the appellant who had an aversion to the use of scientific methods in investigation of crimes and that the appellant had purposely concealed materials which were favourable to the accused in order to secure a conviction at any cost. The learned judge failed to see that a matter of fact



**S. Natarajan**  
**Judge**  
**Supreme Court of India**

accused was not kept in dark regarding the cellophone tape test that was deemed to have been done but on the other hand he had full information of the test and its result, and was on account of that he was able to summon police officials to figure out defence witnesses and police records as defence exhibits. We are, therefore, clearly, of opinion that the High Court had completely misdirected itself in its consideration of the petitions filed by respondents 2 and 3 to seek annulment of the adverse remarks made against them by the Sessions Judge.

13. We have also to point out a grievous procedural error committed by the High Court. Even assuming for argument's sake that for expunging the remarks against respondents 2 and 3 the conduct of appellant required scrutiny and merited adverse comment, the principles of natural justice required the High Court to have issued notice to the appellant and heard him before passing adverse remarks against him if it was considered necessary. By its failure the High Court has failed to render elementary justice to the appellant.

14. Yet another serious infirmity contained in the impugned order is that the High Court has failed to bear in mind the well-settled principles of law laid down by this Court in more than one case that should govern the courts before disparaging remarks are made against persons or authorities whose conduct comes into consideration

before Courts of Law in cases arising before them for decision. In *State of U.P. v. Mohd. Naim* (1964) 2 SCR 363, 374, equal to AIR 1964 SC 703, 707 it was held as follows:

"If there is one principle of cardinal importance in the administration of justice, it is this the proper freedom and independence of Judges and Magistrates must be maintained and they must be allowed to perform their functions freely and fearlessly and without undue interference by anybody, even by this Court. At the same time it is equally necessary that in expressing their opinions Judges and Magistrates must be guided by considerations of justice, fair play and restraint. It is not infrequent that sweeping generalisations defeat the very purpose for which they are made. It has been judicially recognised that in the matter of disparaging remarks against persons or authorities whose conduct comes into consideration before courts of law in cases to be decided by them, it is relevant to consider (a) whether the party whose conduct is in question is before the court or has an opportunity of explaining or defending himself; (b) whether there is evidence on record being on that conduct justifying the remarks; and (c) whether it is necessary for the decision of the case, as an integral part thereof, to animadvert on that conduct. It has also been recognised that judicial pronouncements must be judicial in nature, and should not normally depart from sobriety, moderation and reserve."



This ratio has been followed in (1976) 1 SCR, 204 R. K. Lakshmanon v. A. K. Srinivasan and (1986) 2 SCC 569, Niranjana Patnaik v. Sashibhushan Kar (to which one of us was a party). Judged in the light of the above tests, it may be seen that none of the tests is satisfied in this case. It is indeed regrettable that the High Court should have lightly passed adverse remarks of a very serious nature affecting the character and professional competence and

integrity of the appellant in purported desire to render justice to respondent 2 and 3 in the petition filed by them for expunction of adverse remarks made against them.

15. The appeal is, therefore, allowed and the adverse remarks against the appellant in the order of the High Court which have been extracted above will stand expunged from the order under appeal.

Appeal allowed



**O. Chinnappa Reddy**  
**Judge**  
**Supreme Court of India**

### OBSERVATION

**Selection of-candidates for service Viva voce Omission of Interview Board sub-divide total marks into sub-heads—Held, was not obligatory in instant case as there were no specific instructions to sub-divide total marks—Constitution of India, Art. 315.**

### OBSERVED BY

Mr. O. Chinnappa Reddy and Mr. E.S. Venkataramiah  
 Hon'ble Judges, Supreme Court of India.

### IN

Writ Petn. (Civil) No. 15767 of 1984 decided on 24-1-1986 in the case of Dr. Keshav  
 n Pal, Petitioner v. U.P. Higher Education Services Commission, Allahabad and  
 ers, Respondents :

### TEXT

Chinnappa Reddy, J : — Dr. Keshav  
 n Pal, a Ph. D and a D. Litt. in Sans-  
 who has been teaching degree and  
 t-graduate classes for the last 26 years,  
 has worked as Reader and Head of  
 Department of Sanskrit from August  
 1 onwards and who has further acted  
 Principal of the Lajpat Rai Post-Gra-  
 te College, Sahibabad for two years in  
 1972-73 and again from July 3, 1984, ap-  
 pplied to the U.P. Higher Education Ser-  
 vices Commission for the post of Princi-  
 pal in response to an advertisement invi-  
 ting applications for eight such posts. He  
 was one of the 60 candidates, who were  
 interviewed by the Commission but he  
 was not selected. He has filed the prese-  
 n application under Art. 32 of the  
 Constitution for the issue of a writ que-  
 sioning the selection made by the Com-

mission on two grounds. The first grou-  
 nd was that the Commission was biased  
 as he belonged to an inferior caste name-  
 ly, the Gadariya (Shepherd) caste where-  
 as the gentlemen, who constituted the in-  
 terviewing Board, belonged to the higher  
 castes of Hindu Society. He wanted us  
 to draw the inference of bias from the  
 circumstances, which he alleged in the  
 petition that when he appeared before  
 the Board and when in answer to a  
 query, he told the Board that he be-  
 longed to the Gadariya caste, the  
 Board appeared to lose all interest in  
 him, though, in the beginning, they  
 appeared to be quite impressed with  
 him. According to the petitioners,  
 thereafter the interview was a mere  
 make-believe. It was later that he came  
 to know that the gentlemen, who con-



stituted the Board, belonged to the higher castes and that all the eight persons selected by them also belonged to the higher castes. We are afraid we are unable to draw the inference which the petitioner wants us to draw from the circumstances. There were six members of the interviewing Board and it is too much to think that the Board collectively decided not to select the petitioner for the sole reason that he belonged to an inferior caste and they belonged to higher castes. There is nothing whatever to justify the allegation. The Chairman of the Commission has filed an affidavit and he has denied that any enquiry was made of the petitioner regarding his surname or caste.

2. The second ground on which the petitioner challenged the selection was that it was arbitrary. According to him, he possessed the highest academic qualifications and the longest experience and, therefore, he should have been preferred to all the others who were selected. He contended that though each of the members of the interviewing Board was allocated 50 marks, there was no allocation of the marks for the various heads under which the merit of the candidates was judged. The argument was that although the basis of selection was said to be the candidates academic attainments, teaching experience, administrative experience and suitability for the post of Principal, marks were not separately allocated under each of these heads. This procedure,

according to the petitioner, was arbitrary and resulted in arbitrary selection. The learned counsel for the petitioner primarily relied on the following observations of Bhagwati, J. in *Ajay Hasia v. Khalid Mujib*: AIR 1981 SC 487:

“.....The oral interview test is undoubtedly not a very satisfactory test for assessing and evaluating the capacity and calibre of candidates, but in the absence of any better test for measuring personal characteristics and traits the oral interview test must, at the present stage, be regarded as not irrational or irrelevant though it is subjective and based on first impression its result is influenced by many uncertain factors and it is capable of abuse. We would, however, like to point out that in the matter of admission of colleges or even in the matter of public employment the oral interview test as presently held should not be relied upon as an exclusive test, but it may be resorted to only as an additional or supplementary test and, moreover, great care must be taken to see that persons who are appointed to conduct the oral interview test are men of high integrity calibre and qualification”.

The observation in *Ajay Hasia* case (supra) have been explained in *Lila Dhar v. State of Rajasthan*, (1981) 4 SCC 159: AIR 1981 SC 1777 and what has been said in *Lila Dhar's* case (supra) has been approved by a Constitution Bench of this Court, speaking through Bhagwati, J. in *Ashok Kumar Yadav v. State of Haryana*, (1985



**O. Chinnappa Reddy**  
**Judge**  
**Supreme Court of India**

C 417. In Lila Dhar's case (supra) as pointed out by this Court :

"The object of any process of selection for entry into a public service is to select the best and the most suitable person for the job, avoiding patronage and nepotism. Selection based on merit, tested impartially and objectively, is the essential foundation of any useful and efficient public service. So, open competitive examination has come to be accepted almost universally as the gateway to public services."

....."How should the competitive examination be devised ?....."

"It is now well recognised that while written examination assesses a candidate's knowledge and intellectual ability, interview test is valuable to assess a candidate's overall intellectual and personal qualities. While a written examination has certain distinct advantages, the interview test there are yet no such tests which can evaluate a candidate's initiative, alertness, resourcefulness, dependableness, co-operativeness, ability for clear and logical presentation, effectiveness in discussion, effectiveness in meeting and dealing with others, adaptability, judgement, ability to take decision, ability to lead, intellectual and moral integrity. Some of these qualities may be evaluated, perhaps with a certain degree of error, by an interview-test, much depending on the composition of the Interview Board....."

Thus, the written examination asse-

esses the man's intellect and the interview-test the man himself and "the twain shall meet" for proper selection. If both written examination and interview test are to be essential features of proper selection, the question may arise as to the weight to be attached respectively to them. In the case of admission to a college, for instance, where the candidate's personality is yet to develop and it is too early to identify the personal qualities for which greater importance may have to be attached in later life greater weight has to be given to performance in the written examination. The importance to be attached to the interview-test must be minimal. That was what was decided by this Court in *Periakaruppan v. State of Tamil Nadu* *Ajay Hasia v. Khalid Mujib Sehravardi*, and other cases. On the other hand, in the case of Services to which recruitment has necessarily to be made from persons of mature personality, interview test may be the only way, subject to basic and essential academic and professional requirements being satisfied. To subject such persons to a written examination may yield unfruitful and negative results, apart from its being an act of cruelty to those persons. There are of course, many services to which recruitment is made from younger candidates whose personalities are on the threshold of development and who show signs of great promise, and the discerning may in an interview test, catch a glimpse of the future personality. In the case of such services, where sound selection must combine academic ability with personality promise, some weight has to



be given, though not much too great a weight, to the interview-test. There cannot be any rule of thumb regarding the precise weight to be given. It must vary from service according to the requirements of the service, the minimum qualifications prescribed, the age group from which the selection is to be made, the body to which the task of holding the interview-test is proposed to be entrusted and a host of other factors. It is a matter for determination by experts. It is a matter for research. It is not for Courts to pronounce upon it unless exaggerated weight has been given with proven or obvious oblique motives.....”

These observations in Lila Dhar's case were quoted verbatim in Ashok Kumar Yadav's case (*supra*) and approved. In Lila Dhar's case, the Court also said :

“It is true that in Periakaruppan case (AIR 1971 SC 2303) the Court held

that the non-allocation of marks under various heads in the interview-test was illegal but that was because instructions to the Selection Committee provided that marks were to be awarded on the interview on the basis of five distinct tests. It was thought that the failure to allocate marks under each head for a distinct test was an illegality. But in the case before us, the rule merely and generally indicates the criteria to be considered in the interview-test without dividing the interview-test into distinct tests if we may so call them sub-tests.....”

3. We do not think that the Interviewing Board, in the present case, was under any obligation to sub-divide the marks under various sub-heads. The writ petition is, therefore, dismissed but in the circumstances, without costs.

Petition dismissed



**D. P. Madon**  
**Judge**  
**Supreme Court of India**

### OBSERVATION

- (i) Constitution of India, Art. 311 (2), Second Proviso, Cl. (b) — Dismissal from service without inquiry — Cyclostyled orders passed against several persons — That does not as a universal rule indicate non-application of mind.
- (B) Constitution of India, Art. 311 (2), Second Proviso, Cl. (b) — Bombay Police Act (22 of 1951), S. 25 (1) — Dispensation of inquiry — Recording of reasons — Police constable dismissed from service without inquiry — Reasons for pending inquiry served separately after order of dismissal, appearing to be recorded later — Order of dismissal itself however, containing reasons for dispensation — Dispensation of inquiry was proper.
- (C) Constitution of India Art. 311 (2), Second Proviso, Cl. (b) — Bombay Police Act (22 of 1951), S. 25 (2) — Dispensation of enquiry — Head Constable in selected batch — Dismissal from service after dispensing with inquiry — No prejudice.
- (D) Constitution of India Art. 311 (2), Second Proviso Cl. (b) — Bombay Police Act (22 of 1951), S. 25 (1) — Disciplinary inquiry — Dispensation of — Mutiny — Police force — Police Constable who was one of the active instigators dismissed from service without inquiry — Fact that he was arrested before violence broke out is irrelevant — Enquiry rightly dispensed with.

### OBSERVED BY

Mr. A. P. Sen and Mr. D. P. Madon,  
 Hon'ble Judges, Supreme Court of India

### IN

Civil Appeals Nos. 4041 of 1982 and 4363 of 1985 decided on 14-2-1986, in the case of Shivaji Atmaji Sawant, Appellant v. State of Maharashtra and others, Respondents.

And

Namdeo Jairam Velankar, Appellant v. State of Maharashtra and another, Respondents.

### TEXT

Madon, J. : The Appellant in Appeal No. 4041 of 1982, Shivaji Atmaji Sawant, was a Police Constable in the Bombay City Police Force attached to the Bandra Police Station in

Bombay. He was governed by the Bombay Police Act, 1951 (Bombay Act No. XXII of 1951). By an order dated August 22, 1982, passed by the Commissioner of Police, Greater Bombay, he



was dismissed from service, without a charge sheet having been issued to him and without any inquiry being held with respect to the misconduct alleged against him. The said order of dismissal was passed under Section 25 (1) of Bombay Police Act read with Clause (b) of the second proviso to Article 311 (2) of the Constitution of India. The writ petition filed by sawant challenging the said order of dismissal was dismissed by the Bombay High Court. He has thereupon approached this Court in appeal by way of Special Leave granted by this Court.

2. The Appellant in Civil Appeal No. 4363 of 1985, Namdeo Jairam Velanker, was a Head Constable in Armed Batch No. 645 and was posted at Aurangabad. He too was governed by the Bombay Police Act. He was also dismissed in the same way as Sawant by an order dated August, 22 1982, passed by the Superintendent of Police, Aurangabad, under Section 25 (2) of the Bombay Police Act read with Clause (b) of the second proviso to Article 311 (2) of the Constitution. He had also filed a writ petition before the Aurangabad Bench of the Bombay High Court which was dismissed and he too has approached this Court in appeal by way of special Leave granted by this Court.

3. Section 25 of the Bombay Police Act specifies the officers who are entitled to punish the members of the Bombay Police Force. Under Clause (b) of the second proviso to Article 311 (2) of the Constitution, an authority empow-

wered to dismiss or remove a civil servant or reduce him in rank is authorised to dispense with the inquiry provided Clause (2) of Article 311, if it is satisfied that for some reason to be recorded by it is not reasonably practicable to hold such inquiry. In the case of *Union of India v. Tulsiram Patel and others* connected matters, (1985) 3 SCC 398 Constitution Bench of this Court has considered in great detail the scope and effect of Articles 309, 310 and 311 of the Constitution and particularly of the second proviso to Article 311 (2). The conclusions reached by this Court in *Tulsiram Patel's* case have been summarized in *Satyavir Singh v. Union of India*, (1985) 4 SCC 252 : AIR 1986 S 555). In view of this decision the only contention raised before us at the hearing of these Appeals was that the impugned orders of dismissal suffered from a total non-application of mind. The facts on the record, however, completely belied this contention and we will not proceed to narrate them.

4. Article 33 of the Constitution empowers Parliament by law to determine to what extent any of the rights conferred by Part III of the Constitution (that is, the Fundamental Rights) shall in their application inter alia to the Forces charges with the maintenance of public order be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline among them. In pursuance of this power Parliament has enacted the Police Forces (Restriction of Rights) Act, 1966 (Act No. 33 of 1966).



shown by the Statement of Objects and Reasons and the long title of the Act is to provide for the restriction of certain Fundamental Rights in their application to the members of the Forces charged with the maintenance of public order so as to ensure the proper discharge of their duties and the maintenance of discipline among them. Under Section 3 of the said Act is to come into force on such date as may be appointed in this behalf by notification in the Official Gazette in a Union Territory by the Central Government and in a State, by the Government of that State. It was brought into force in the State of Maharashtra with effect from July 15, 1979, by Notification No. PPF 0229-PLO-III dated July 10, 1979, published in the Maharashtra Government Gazette dated July 26, 1979, Part IVA at page 502. Clause (a) of Section 2 of the said Act gives the expression "member of a police-force" as meaning "any person appointed or enrolled under any enactment specified in the Schedule". Among the enactments so specified is the Bombay Police Act, 1951. Under Section 3 of the said Act of 1966, no member of a Police Force is, without the express sanction of the Central Government or of the prescribed authority, to be a member of or be associated in any way with, a trade union, labour union, political association, or with any class of trade unions, labour unions or political associations, or be a member of, or be associated in any way with any society, institution, associ-

ation or organization that is not recognized as part of the Force of which he is a member or is not of a purely social, recreational or religious nature. Further, a member of a Police Force is prohibited from participating in or addressing any meeting or taking part in any demonstration organized by any body of persons for any political purposes or for such other purposes as may be prescribed by rules made under the said Act. Rule 3 of the Police Forces (Restriction of Rights) Rules, 1966, provides as follows :

3. Additional purposes for which a member of a police-force not to participate in, or address any meeting, etc.

No member of a police-force shall participate in or address any meeting or take part in any demonstration organised by any body of persons —

(a) for the purpose of protesting against any of the provisions of the Act or these rules or any other rules made under the Act; or

(b) for the purpose of protesting against any disciplinary action taken or proposed to be taken against him or against any other member or members of a police-force; or

(c) for any purpose connected with any matter pertaining to his remuneration or other conditions of service or his conditions of work or his living conditions or the remuneration, other conditions of service, conditions of work or living conditions, of any other member of a police-force;



Provided that nothing contained in Clause (b) shall preclude a member of a police force from participating in a meeting convened by an association of which he is a member and which has been accorded sanction under sub-section (1) of Section 3 of the Act, where such meeting is in pursuance of or for the furtherance of the object of such association."

Under Section 4, any person who contravenes the provisions of Section 3 commits an offence and is liable, without prejudice to any other action that may be taken against him, to be punished with imprisonment for a term which may extend to two years or with fine which may extend to Rs. 2000 or with both.

5. With a view to give members of the Bombay Police Force an opportunity to ventilate their grievances with respect to service conditions and allied matters the Government of Maharashtra announced that it would permit the members of the Force to form associations at the State level as well as Unit level. The authority to grant recognition to such associations was Inspector General of Police, Maharashtra State. Before any recognition was given, associations were formed and office-bearers elected. The association at the State level was the Maharashtra Police Karamchari Sanghata and at the Greater Bombay level was the Maharashtra Police Karamchari Sanghata, Greater Bombay. The Inspector-General of Police granted recognition to these

association by his order dated March 20, 1982, on conditions (1) that members should not resort to strike or withhold their services or otherwise deride the performance of their duties in any manner, (2) that the Association should not resort to any coercive method or agitation for obtaining redressal of grievances, and (3) that the Association should not do anything which may affect the efficiency of the Force or undermine its discipline.

6. Sawant is alleged to have taken the lead along with one S. D. Mohite in forming the Greater Bombay Association and starting its activities. It is further alleged that from the inception of the activities of this Association, the principal office-bearers and leaders started spreading an atmosphere of indiscipline culminating in the members of the Police Force, including Sawant, wearing black bands and badges on the Independence Day of 1982, namely, August 15, 1982. Consequently, the State Government suspended the recognition of the Association for a period of three months. This resulted in Bombay a strike of the police constabulary and widespread rioting, arson, looting and other acts amounting to mutiny from August 18, 1982. The situation became so serious that on the very day of the outbreak of those incidents, namely August 19, 1982, military and paramilitary forces had to be summoned to deal with the members of the Police Force who had rioted and mutinied and even then it took some days for normalcy to be restored. The events which



place on and from August 18, 1982, not disputed. In fact, in his Petition Special Leave to Appeal Sawant has self described them as "deplorable events".

7. Three contentions were urged on behalf of Sawant in order to substantiate the contentions that the impugned order of dismissal passed against him without any application of mind. The first contention was that Sawant was arrested in the early hours of August 18, 1982, and, therefore, did not and could not have taken part in incidents of violence, arson, looting and Mutiny which took place on and after that date. Assuming it is so, Sawant is alleged to have been one of the active instigators and leaders who were responsible for the creation of such a serious situation which rendered all normal functioning of the Police Force impossible. As pointed out by this Court in *Satyavir Singh v. Union of India* (1985 (4) SCC 252) it is not necessary that the disciplinary authority should wait until incidents take place in which physical injury is caused to others before taking action under clause (b) of the second proviso to Article 311(2). A person who incites others to commit violence is as guilty if not more so, than the one who indulges in violence, for the one who indulges in violence may not have done so without the instigation of the other. The second contention was that identical orders were passed against forty-three other members of the constabulary and

that all these orders, including the one served upon Sawant, were cyclostyled. Where several cyclostyled orders are passed, it would prima facie show non-application of mind but this is not a universal rule and would depend upon the facts and circumstances of each case. In *Tulsiram Patel's case*, (1985) (3) SCC 398 cyclostyled orders were served upon several members of the Unit of the Central Industrial Security Force posted at Bakaro with the names of the individual members filled in. Rejecting a similar contention raised in that case, this Court observed.

"It was said that the impugned orders did not set out the particular acts done by each of the members of the CIS Force in respect of whom dismissal order was made, and these were merely cyclostyled order with the names of individual members of the CIS Force filled in. Here was a case very much like a case under Section 149 of the Indian Penal Code. The acts alleged were not of any particular acting by himself. These were acts of a large group acting collectively with the common object of coercing those in charge of the administration of the CIS Force and the Government in order to obtain recognition for their association and to concede their demands. It is not possible in a situation such as this to particularize the acts of each individual member who participated in the commission of these acts. The participation of each individual may be of greater or lesser degree but the acts of each individual con-



tributed to the creation of a situation in which a security force itself become a security risk."

The third contention was that the reasons for dispensing with the inquiry did not accompany the order. In Tulsi-ram patel's case this Court held that the recording of the reason for dispensing with the inquiry is a condition precedent to the application of Clause (b) of the second proviso and if such reasons are not recorded in writing, the order dispensing with the inquiry and the order of penalty following thereupon would both be void and unconstitutional. The Court also held that though it was not necessary that the reasons should find a place in the final order imposing penalty, it would be advisable to record them in the final order so as to avoid an allegation that the reasons were not recorded in writing before passing the final order but were subsequently fabricated. What had happened in Sawant's case was that either along with the order or soon thereafter, reasons in writing for dispensing with the inquiry were served upon Sawant. A perusal of the reasons shows that they were recorded later. Were the impugned order of dismissal one which merely imposed a penalty, it would have been bad and would require to be struck down in view of the decisions in Tulsi-ram Patel's case. The position is, however, different. The impugned order of dismissal itself sets out the reasons why it was not reasonably practicable to hold the inquiry. It is stated in the said

order that some members of the Bombay City Police Force, including Sawant had been instigating others to indulge in acts of insubordination and indiscipline and were instigating them to withdraw from their lawful duties, inciting them to violence and mutiny, joining rioting mobs and participating in arson, looting and other criminal acts and were wilfully disobeying orders of their superior officers and that these acts had created a situation whereby the normal functioning of the Force in Bombay had been rendered difficult and impossible, and that in view of these facts and circumstances, any attempt to hold a departmental inquiry by serving a written charge-sheet and following the procedure laid down in the Bombay Police (Punishments and Appeals) Rules, 1957 would be frustrated by the collective action of those persons and it was; therefore, not practicable to hold such an inquiry. The "reasons" served separately merely amplified and elaborated what had been stated in the impugned order. There is thus no substance in any of the contentions advanced in the case of Sawant and it must be held that Clause (b) of the second proviso to Article 31(2) was rightly applied in his case.

8. We now turn to the case of Velankar. He was the President of the Aurangabad Branch of the said Association. He was dismissed along with four other members of the Force posted at Aurangabad. The order of dismissal in his case sets out in detail the acts of misconduct alleged against him, the situation which was prevailing in Aurangabad



and the reasons why it was not reasonably practicable to hold a disciplinary inquiry against him. Briefly summarised when the violence broke out in Bombay on August 18, 1982, a similar action was attempted to be brought in Aurangabad by Velankar and four others who were dismissed with him. Velankar is said to have participated in a procession on August 21, 1982, in which a procession shouted provocative slogans, demanding the release of those arrested in Bombay who had been arrested and demanding their reinstatement and revocation of orders of suspension passed against others in Bombay. It is from these acts being in continuation of Clause (b) of Rule 3 of the Police Forces (Restriction of Powers) Rules, 1966, swift action was necessary. The history of Bombay should not be repeated in Aurangabad. The authorities could not be expected to take steps to put down the threatened insurrection. In these circumstances, it cannot be said that in the case of Velankar, Clause (b) of the second proviso to Article 311 (2) was wrongly applied.

9. It is contended that both these appellants are innocent of the misconduct charged against them. If so they should not be without any remedy. Under Section 27 of the Bombay Police Act, 1948, an appeal lies against an order imposing a penalty upon a member of the Police Force to such officer as the State Government may specify by

general or special order. The appellate authorities have been specified in Schedule II to the Bombay Police (Punishments and Appeals) Rules, 1956. Under Rule 11, an appeal is to be filed within two months of the date on which the Appellant was informed of the order, appeals against. The said Rule 11 confers upon the appellate authority, for good reasons shown, to extend the term for filing the appeal by six months. Rule 17 confers revisional jurisdiction upon the Inspector-General of Police. Under sub-rule (1) of Rule 17, the Inspector-General of Police may, of his own motion or otherwise, call for and examine the record of any case in which an order, whether an original order or an order in appeal, inflicting any punishment has been made by any authority subordinate to him in the exercise of any power conferred on such authority by said Rules and in which an appeal lies to him or an authority subordinate to him but such appeal has not been made in accordance with provisions of the said Rules or if such appeal has been made, after the appeal is decided by the appellate authority. Under sub-rule (2) of Rule 17, an application for revision is to be made within two months of the date on which the applicant was informed of the order complained. The Inspector-General is, however, given the power, for good cause shown to relax that period.

10. Assuming for the sake of argument that Sawant and Velankar were not guilty of the charges levelled against them, they have a departmental remedy provided by the said Rules. The period



for filing an appeal has, however, expired and even the time for extending that period has also expired. The Appellants can, however, approach the Inspector General of Police in revision and the ends of justice would be met if we direct the Inspector-General of Police to entertain such applications for revision by relaxing the period of limitation and hearing such applications on the merits.

11. We may also mention that by a Circular No. PSA 0283/POL-5A dated July 5, 1984, the Government of Maharashtra, on humanitarian grounds as a Part of the rehabilitation programme of police personnel dismissed from service or whose services were terminated in the wake of the police agitation which took place in August 1982, has decided that they would be considered for absorption in security jobs such as watchmen etc. under the Maharashtra State Electricity Board, Maharashtra State Road Transport Corporation, Maharashtra Agro-Industries Development Corporation, Agricultural Universities, Research Stations, State warehousing

Corporation, etc., and that wherever the age limits would be relaxed in respect of these ex-policemen for making the appointments which would be treated as fresh appointments.

12. In the result, we dismiss both these Appeals, but direct that in case either of these two Appellants file an application for revision to the Inspector General of Police, Maharashtra State, by April 15, 1986, the Inspector-General of Police shall condone the delay and hear and dispose of the said application on the merits. The Appellant in each of these Appeals may also either without filing any application for revision or after such application fails apply to take advantage of the said Circular No. PSA 0283/POL-5A dated July 5, 1984 issued by the Government of Maharashtra. All interim orders if any, in the two Appeals will stand vacated.

13. The parties will bear and pay their own costs of these two appeals.

Appeals dismissed



## OBSERVATION

**Delayed payment of purchase tax—Notice demanding interest—Notice is invalid on ground that there was no order imposing or assessing such interest—U. P. Sugarcane (Purchase Tax) Act (9 of 1961), Secs. 3 (3) and 3 (5) amended in 1971).**

## OBSERVED BY

Mr. D. P. Madon and Mr. G. L. Oza,  
Hon'ble Judges, Supreme Court of India

## IN

Civil Appeal No. 946 (N) of 1972, decided on 20-12-1985 in the case of Shri Anand Mills, Appellant v. State of U. P. and others, Respondents.

## TEXT

Madon, J :—This Appeal by certificate is directed against the judgement and order of the Allahabad High Court dismissing the Writ Petition filed by the Appellant Firm challenging the validity of a notice dated April 21, 1970, demanding Rs. 1,76,788 on account of interest on delayed payment of purchase tax under the U. P. Sugarcane Purchase Tax Act, 1961 (U. P. Act No. IX of 1961), and a recovery certificate dated March 6, 1970 for Rs. 80,072.95 on account of cane price and interest thereon under the U.P. Sugarcane (Regulation of Supply and Purchase) Act, 1953 (U. P. Act No. XXIV of 1953), issued by the Cane Commissioner, U. P., and a notice dated April 21, 1970, from the Tahsildar, Khalilabad, demanding payment of the said sum of Rs. 80,072.95.

2. The facts which have given rise to this appeal lie within a narrow compass. The Appellant Firm carries on the business of manufacturing sugar of

Khalilabad in the District of Basti in the State of Uttar Pradesh. By his notice dated December 14, 1967, the Cane Commissioner, U. P., called upon the Appellant Firm to deposit in the Government Treasury within 15 days a sum of Rs. 1,79,870 due on account of interest on delayed payment of purchase tax under the U. P. Sugarcane (Purchase Tax) Act, 1961, up to October 31, 1967. The said notice concluded by stating "All the papers for the verification of the figures of the amount of interest can be seen in the office of the Cane Inspector." By its reply dated December 22, 1967, the Appellant Firm informed the Sugarcane Inspector, Gorakhpur, that it was sending its clerk to him for the purpose of receiving the details of the said amount for doing the needful in the matter. By his notice dated April 21, 1970, the Tahsildar, Khalilabad, intimated to the Appellant Firm that the Cane Commissioner had sent a recovery



certificate for Rs. 1,76,788 "on account of interest on purchase tax ending 31-3-1969" and called upon the Appellant Firm to deposit the said sum in the Treasury by May 15, 1970, failing which coercive measures would be adopted. A copy of the said notice was annexed as Annexure "C" of the Appellant Firm's Writ Petition. By his recovery certificate dated March 6, 1970, forwarded to the Collector, Basti, the Cane Commissioner, U.P., certified that a sum of Rs. 80,072.95 was due by the Appellant Firm as "arrears of price of sugarcane, commission and/or interest thereon for the period ending 31-1-1970" due by the Appellant Firm to the Co-operative Cane Development Unions whose names were mentioned in the said certificate. The said certificate further stated that interest included in the certificate had been charged at  $7\frac{1}{2}$  per cent per annum from the due date of payment and that further interest at the same rate should be realized on all unpaid amounts till the date of the final payment. Copies of this certificate were sent inter alia to the Appellant Firm and to the Honorary Secretaries of Co-operative Cane Development Unions of Khalilabad, Shahjahanwa, Govind Nagar and Gaur. A copy of this recovery certificate was annexed to the Appellant Firm's Writ Petition as Annexure "D". By its letter dated March 9, 1970 the Appellant Firm forwarded to the District Cane Officer, Basti, a copy of memorandum of settlement bearing the same date in which it was stated that the Appellant Firm and

the Co-operative Cane Development Union Ltd., Khalilabad, had reconciled their amounts up to 1968-69 relating to cane price and interest thereon and a commission as set out in the said memorandum. The said memorandum of settlement further stated that two cheques, both dated March 9, 1970, on account of cane price and interest thereon were enclosed in full and final settlement of such account. By its letter dated March 11, 1970 addressed to the Cane Commissioner, U. P., the Appellant Firm raised various contentions regarding the amount claimed in the said recovery certificate dated March 6, 1970. In view of the order we propose to pass, it is unnecessary to refer to the contentions raised in the said letter. By this notice dated April 21, 1970, the Tahsildar, Khalilabad intimated to the Appellant Firm that the Cane Commissioner had sent to him the said recovery certificate for Rs. 80,072.95 and called upon the Appellant Firm to deposit the said amount in the Government Treasury by May 15, 1970. A copy of the said notice was annexed to the Appellant Firm's Writ petition as Annexure "E".

3. The Appellant Firm thereupon filed a Writ Petition in the High Court being Civil Misc. Writ Petn. No. 208 of 1970, challenging the validity of the said notices and recovery certificate, namely, Annexures "C" "E" and "D" of the Writ Petition. The main contention of the Appellant Firm in the said Writ Petition was that so far as the notice demanding interest on delayed payment of purchase tax, namely, Annexure "C"



he Writ Petition, was concerned, on rest could be demanded untill an or- assessing or imposing such interest passed. The other contention was the said notice gave no details or particulars of the amount claimed and so far as the said recovery certifi- dated March 6, 1970, and the said ce dated April 21, 1970, namely, An- are "D" and "E" to the said Writ tion, were concerned, part of the unt shown as due had already been or adjusted and the rest was the sub- matter of pending arbitration procee- s.

4. The Appellant Firm's Writ peti- was heard along with other writ ions which raised the same conten- with respect to the validity of the ce demanding interest or delayed ment of purchase tax under the U. P. arcane (Purchase Tax) Act, 1961. In y of the amendments made with ret- ective effect in sub-sections (3) and of S. 3 of the said Act by Chapter V he Uttar Pradesh Taxes and Fees s (Amendment) Ordinance, 1970 2, Ordinance No. (14 of 1970), which repealed and replaced by the Uttar esh Sugarcane (Purchase Tax) (Am- ment) Act, 1970 (U. P. Act No. 1 of ), the Allahabad High Court dismis- all these writ Petitions with no order o costs.

5. The Appellant Firm thereafter this appeal after obtaining a certifi- from the High Court under clause of Art. 133 of the Constitution of In- prior to the amendment of that clause the Constitution (Thirtieth Amend-

ment) 1972 Act, on the ground that the amount in dispute at the time of the filing of its Writ Petition and in dis- pute on appeal was more than Rs. 20,000.

6. The effect of the said amendment made in sub-sections (3) and (5) of S. 3 of the U. P. Sugarcane purchase Tax) Act, 1961 and of the validating section in the said Ordinance and in the said Am- endment Act has been considered by this Court in Civil Appeal No. 947 (N) of 1972 Ganesh Sugar Mills v. State of Uttar Pradesh. In that case this Court held that as a result of the said amend- ments which were made with retrospective effect and in view of the said validating sections the contention that no interest on delayed payment of purchase tax could be demanded or recovered without an order assessing or imposing or inte- rest did not hold good any longer and the position had been put beyond all doubt by the said validating provision. The High Court was, therefore, right in rejecting this contention raised by the Appellant Firm.

7. The High Court has not, how- ever, dealt with the other contentions raised in the Appellant Firm's Writ Petition. This was very probably due to the fact that several writ petitions were heard together and disposed of by a common judgement and the High Court's attention was not drawn to the facts of each individual case. These contentions were that no particulars were given of the amount of interest on delayed payment of purchase tax



and that the Appellant Firm had paid part of the purchase price of sugarcane and that the rest of the amount was disputed and was the subject-matter of pending arbitration proceedings. The Appellant Firm has made a grievance of this in its application for grant of certificate made to the High Court as also in its statement of case filed in this Court. So far as the Appellant's contention that, no particulars were given of the amount claimed as interest on delayed payment of purchase tax is concerned, a similar contention was raised in Ganesh Sugar Mills' case and has been upheld. The factual position here is the same. All that the said notice dated April 21, 1970 (Annexure "C" to the Appellant Firm's Writ petition) states is that it is "on account of purchase tax ending 31-3-1969". In the counter affidavit filed by the Sugarcane Inspector-Assistant Sugarcane Commissioner, Gorakhpur, it was stated that in pursuance of the Appellant Firm's said letter dated December 22, 1967, a representative of the Appellant Firm had come to the office of the Sugarcane Inspector, Gorakhpur, and was furnished with information regarding the amount of interest due on delayed payment of purchase tax. This has been denied in the affidavit in rejoinder filed by the Appellant Firm. Even assuming that what is stated in the counter-affidavit is true, it does not help the respondents because the said letter dated December 22, 1967, was written with reference to the said notice dated December 14, 1967, from the Cane Commissioner to the Appellant

Firm claiming a sum of Rs. 1,79,800 on account of interest on delayed payment of purchase tax up to October 31, 1967. It was not this notice which was challenged in the Appellant Firm's Writ Petition but the said notice dated April 21, 1970, claiming a sum of Rs. 1,76,700 on account of interest on delayed payment of purchase tax for the period ending March 31, 1969, a copy of which was annexed to the Writ Petition as Annexure "C". For the reason stated in this Court in Ganesh sugar Mill's case, the order will meet the ends of justice if the same order is also made in this appeal as in that case. So far as the dispute relating to the recovery of purchase price of sugarcane and commission and interest thereon is concerned, the High Court has not heard that part of the case and it therefore, becomes necessary to remit the Writ Petition to the High Court for a determination on that point.

8. In the result, though we confirm the judgement of the High Court with respect to the finding that the notice demanding interest on delayed payment of purchase tax was not invalid on the ground that there was no order imposing or assessing such interest, we set aside the order dismissing the Appellant Firm's Writ Petition and in place thereof we substitute the following order.

The Cane Commissioner, U. P. will furnish to the Appellant Firm within one month from today particulars of the amount of interest claimed in the notice dated April 21, 1970, from the Tahsildar



labad (Annexure "C" of the Appellant Firm's Writ Petition in the High Court). Such particulars will consist of the period for which the tax was paid, the amount of such tax, and the date when such tax was due and when it was in fact paid. If the Appellant Firm contests any of these particulars, it will be open to it to file its objections before the Cane Commissioner within one month of the receipt of such particulars. The Cane Commissioner will dispose of such objections within one month after giving an opportunity of being heard to the Appellant Firm. If the Cane Commissioner finds that any amount of tax was paid late, the Appellant will pay interest due on the same within one month of the intimation to it by the Cane Commissioner's order on the objections, if any, filed by the Appellant, and if no objections are filed by the Appellant Firm, then within six weeks of the receipt by the Appellant Firm of the particulars mentioned above. In default of payment as aforesaid, the Cane Commissioner will be entitled to adopt reco-

very proceedings in respect of the amount of interest payable. No recovery proceedings in respect of interest for the period to which the said notice dated April 21, 1970, relates will be taken until the date for payment specified by us above has expired.

9. The Appellant Firm's Writ Petition, namely, Civil Miscellaneous Writ Petition No. 2088 of 1970, in so far as it relates to the challenge to the said recovery certificate dated March 6, 1970, (Annexure "D" to the Appellant Firm's Writ Petition), and the said notice dated April 21, 1970, from the Tahsildar, Khalilabad (Annexure "E" to the Appellant Firm's Writ Petition), is remitted back to the High Court for disposal on merits, which the High Court will endeavour to do as expeditiously as possible. In the meantime, no proceeding will be taken for the recovery of the said recovery certificate dated March 6, 1960 (1970?), and the said notice dated April 20, 1970.

10. There will be no order as to the costs of this appeal.

Order accordingly.



**IT IS THE ESSENCE OF DEMOCRACY  
TO OBEY  
NO MASTER BUT THE LAW**



## OBSERVATION

cured liabilities due to bank excluded by notification while suspending all  
ities under contract to which notified was party—Suit filed by a bank ag-  
notified sugar mill and its guarantors for recovery of amount due from  
mill; would remain unaffected by the notification—Any proceeding against  
uarantor would remain unaffected by the issuance of such a notification —  
r undertakings (Taking over of Management) Act (49 of 1978), Sec. 7 (Noti-  
on under).

## OBSERVED BY

Mr. E. S. Venkataramiah and Mr. M. P. Thakkar  
Hon'ble Judges, Supreme Court of India

## IN

Civil Appeals Nos. 569-70 of 1986, D/14-2-1986 in the case of State Bank of India,  
llant v. M/s. Saksaria Sugar Mills Ltd. and others, Respondents :

## TEXT

Venkataramiah, J. :—These appe-  
by special leave are filed against the  
dated May 25, 1984 passed by the  
Court of Allahabad in Civil Revi-  
No. 136 of 1982 and the order  
February 22, 1985 in C.M.A. No.  
(M) of 1984 on the file of that  
t.

2. The appellant, the State Bank of  
had allowed cash credit facility to  
Saksaria Sugar Mills Ltd., respon-  
No. 1 herein, on the security of the  
produced at the sugar factory  
ging to respondent No. 1. Res-  
ent No. 1 had also deposited  
Bombay office of the state Bank  
dia on February 2, 1962 by way of  
ble mortgage the title deeds of its  
vable properties to secure the

amount advanced under the said cash  
credit facility. Respondents Nos. 2 to 5  
M/S. Govind Ram and Brothers, Shri  
K. G. Saksaria, Shri G. L. Vaid and  
Shri R. K. Saksaria had agreed to be  
the guarantors for the repayment of any  
amount due from respondent No. 1  
under the said cash credit accou-  
nt. Since there was default in repayment  
of the amount due under the said cash  
credit account the State Bank of India  
instituted a suit in suit No. 18 of 1980  
on the file of the Additional District  
Judge, Gonda for recovery of a sum of  
Rs. 54,89,822.99 as on March 6, 1980  
against respondents Nos. 1 to 5 who  
were described as defendants Nos. 1 to  
5 in the plaint praying for a decree in  
terms of O. 34, R. 4, C. P. C. and further



consequential direction. In the meanwhile by virtue of an order made by the Central Government under the Sugar Undertakings (Taking Over of Management) Act, 1978 (Act No. 49 of 1978) (hereinafter referred to as 'the Act') the sugar undertaking belonging to respondent No. 1 had been taken over by the Central Government and one Raghubir Singh had been appointed as the Custodian of the said undertaking. The State Bank of India, therefore, impleaded Raghubir Singh and the Union of India also as defendants Nos. 6 and 7 in the suit. In the suit respondents Nos. 1 to 5 pleaded inter alia that the trial court had no territorial jurisdiction to try the suit and that the suit was not maintainable and at any rate the suit was liable to be stayed in view of the provision of the Act. The trial Court had framed two issues arising out of the above pleas. The defendants filed an application before the trial court on September 6, 1982 requesting it to decide first the above two issues relating to its jurisdiction and its competence to proceed with the suit. After hearing the parties court found that it had jurisdiction to try the suit as the properties given as security were situated within its jurisdiction and that there was no impediment to proceed with the trial notwithstanding the fact that the management of the mill of respondent No. 1 had been taken over by the Central Government under the Act. Aggrieved by the said decision of the trial court, respondent No. 1 filed a revision petition in Civil Revision No. 136 of 1982 before the High Court of Allahabad. The

High Court allowed the revision petition holding that the trial of suit in far as relief No. 1 namely the prayer for decree for Rs. 54, 89,822.99 against respondents Nos. 1 to 5 was concerned was liable to be stayed by virtue of the provisions of the Act. The High Court however directed that the trial of the suit with regard to all other matters may proceed. Since the only relief prayed in the suit was in respect of the recovery of Rs. 54,89,822.99 from respondents Nos. 1 to 5 in accordance with the provisions of O. 34, R. 4, C.P.C. and the suit had been stayed the State Bank of India applied to the High Court by filing an application No. C. M. A. 644 (M) of 1984 for clarification as to what other matter could be tried in the suit. The application was rejected by the High Court by its order dated February 2, 1985 holding that the provisions of O. 34, R. 4, C. P. C. were quite clear and it was for the court below to proceed in accordance with law. The High Court was of opinion that the order needed no further clarification. Aggrieved by the orders passed on revision in Civil Revision No. 136 of 1982 and the order passed in C.M.A. No. 644 (M) of 1984 the State Bank of India has filed this appeal by special leave.

3. The only question canvassed before us by the parties relates to the question whether the trial of the suit should be stayed by reason of the provisions of the Act. There is no dispute about the territorial jurisdiction of the trial court. It is contended by respondents Nos. 1 to 5 that since the management of the sugar undertaking belong



**E. S. Venkataramiah**  
**Judge**  
**Supreme Court of India**

the respondent No. 1 had been taken over by the Central Government under the Act. the trial of the suit filed by the respondent No. 1 for recovery of the amount due from the sugar undertaking was liable to be stayed. It is not true that the Central Government had taken over the management of the undertaking belonging to the respondent No. 1 by issuing a notification under S. 3 of the Act and has appointed a custodian under S. 5 thereof. The relevant part of S. 7 of the Act which is relevant for the purposes of this case is thus :

‘7. Power of Central Government to make certain declarations.—(1) The Central Government may, if it is satisfied in relation to a notified sugar undertaking that it is necessary so to do in the interests of the general public with a view to preventing the fall in the price of production of the sugar industry, it may, by notification, declare

(a).....

(b) the operation of all or any of the contracts, assurances of property, agreements, settlements, awards, standing orders or other instruments in force (to which such sugar undertaking or the person owning such undertaking is a party or which may be applicable to such sugar undertaking or person) immediately from the date of issue of the notification shall remain suspended or that all any of the rights, privileges, obligations and liabilities accruing or arising under before the said date, shall remain suspended or shall be enforceable

with such adaptations and in such manner as may be specified in the notification.

.....

(4) Any remedy for the enforcement of any right, privilege, obligation or liability referred to in clause (b) of sub-section (1) and suspended or modified by a notification made under that sub-section shall, in accordance with the terms of the notification remain suspended or modified and all proceedings relating thereto pending before any Court, tribunal, officer or other authority shall accordingly remain stayed or be continued subject to such adaptations. So, however, that on the notification ceasing to have effect —

(a) any right, privilege, obligation or liability so remaining suspended or modified shall become revived and enforceable if the notification had never been made :

(b) any proceeding so remaining stayed shall be proceeded with subject to the provisions of any law which may then be in force, from the stage which had been reached when the proceedings became stayed.”

4. Clause (b) of S. 7 (1) of the Act which is extracted above empowers the Central Government to issue a notification declaring the operation of all or any of the contracts, assurances of property, agreements, settlements, awards, standing orders or other instruments in force (to which a notified sugar undertaking or the person owning such undertaking is a party or which may be applicable to such sugar undertaking or per-



son) immediately before the date of issue of the notification shall remain suspended or that all or any of the rights, privileges, obligations and liabilities accruing or arising thereunder before the said date shall remain suspended or shall be enforceable with such manner as may be specified in the notification. Sub-section (4) of S. 7 of the Act provides that any remedy for the enforcement of any right, privilege, obligation or liability referred to in clause (b) of sub-section (1) of S. 7 and suspended or modified by a notification made under that sub-section shall in accordance with the terms of the notification, remain suspended or modified and all proceedings relating thereto pending before any Court, tribunal, officer or other authority shall accordingly remain stayed or be continued subject to such adaptations, so, however, that on the notification ceasing to have effect (a) any right, privilege, obligation or liability so remaining suspended or modified shall become revived and enforceable as if the notification had never been made; and (b) any proceeding so remaining stayed shall be proceeded with subject to the provisions of any law which may then be in force from the stage which had been reached when the proceedings became stayed.

5. A reading of clause (b) of sub-section (1) and sub-section (4) of S 7 of the Act makes it clear that it is only on the issuance of a notification by the Central Govt. under S. 7 (1) (b) containing the necessary declaration that the operation of all or any of the con-

tracts etc. entered into by the notified sugar undertaking which are referred to in the said notification shall remain suspended or that all or any of the rights, privileges, obligations and liabilities accruing or arising thereunder before the said date shall remain suspended. The Act does not provide that on a sugar undertaking being notified automatically all the contracts, assurances of property or agreements etc. entered into by such sugar undertaking would become unenforceable. It states that only those contracts, assurances of property or agreements etc. which are specified in the notification issued under S. 7 (1) (b) (not all contracts) would become suspended and the rights, privileges, obligation and liabilities arising under them would not be enforceable. In the instant case the Central Government has issued notifications from time to time specifying the contracts, assurances of property, agreements etc. the operation of which would stand suspended or stayed during the period of its management of the sugar undertaking in question. The latest notification issued in that connection is dated March 21, 1984. It reads thus :

“S. O. 181 (E), whereas the Central Government is satisfied that in relation to the Saksaria Sugar Mills Limited manufacture sugar at Babhanan in the district of Gonda in the State of Uttar Pradesh being the notified sugar undertaking it is necessary so to do in the interests of the general public with



to preventing the fall in the  
of production of the sugar  
ry.

Therefore, in exercise of the pow-  
ferred by clause (b) of sub-section  
ad with sub-section (2) of section 7  
Sugar Undertakings (Taking Over  
management) Act, 1978 (49 of 1978),  
a continuation of the notification  
Government of India in the  
try of Food and Civil Supplies  
rtment of Food) No. S. O. 196 (E)  
the 22nd March, 1983, the Central  
nment hereby declares that the  
tion of all obligations and  
ties accruing or arising out of all  
acts, assurances of property,  
ments; settlements, awards, stand-  
rds or other instruments in force  
diately before the 28th March,  
(other than those relating to  
ed liabilities to banks and financial  
utions) to which the said sugar  
taking or the person owning the  
sugar undertaking is a party, or  
a may be applicable to the said  
undertaking or that person, shall  
n suspended for a further period  
28th March 1984 to 12-3 1985."

5. The above notification clearly  
out the contracts, assurances of  
erty etc. the operation whereof  
pended or stayed. The Central  
nment has 'made a declaration by  
notification to the effect that  
operation of all obligations  
liabilities accruing or arising out  
l contracts, assurances of proper-  
reements, settlements, awards,  
ing orders or other instruments in

force immediately before the 28th March,  
1980 (other than those relating to secured  
liabilities to banks and financial institu-  
tions) to which the said sugar undertaking  
of the person owning the said sugar  
undertaking is a party shall remain sus-  
pended up to March 12, 1985. It is very  
clearly stated in the said notification that  
it does not apply to secured liabilities  
due to banks and financial institutions.  
The liability involved in the suit was a  
secured liability and the creditor is the  
State Bank of India. Yet the High  
Court surprisingly has proceeded to  
hold that the operation of the contract,  
assurance of property and agreement in  
respect of the undertaking and its pro-  
perty entered into with the State Bank of  
India is to be suspended and the suit in  
respect of them should be stayed in view  
of the Act and the notification issued  
thereunder.

7. It is unfortunate that the High  
Court erred in overlooking words  
"other than those relating to secured  
liabilities to banks and financial institu-  
tions referred to in the notification  
which had the effect of excluding the  
mortgage in favour of the State Bank  
of India from the scope of the notifica-  
tion issued under S. 7 of the Act. The  
High Court further erred in not noticing  
that even when a notification is issued  
under S. 7 (i) (b) of the Act suspending  
the operation of any agreement or  
assurances of property to which a  
notified sugar undertaking or the person  
owning is a party, any proceeding against  
the guarantor would remain unaffected  
by the issuance of such a notification.



Under S. 128 of the Indian Contract Act, 1872, save as provided in the contract, the liability of the surety is co-extensive with that of the principal debtor. The sureties thus become liable to pay the entire amount. Their liability was immediate and it was not deferred until the creditor exhausted his remedies against the principal debtor. The Act does not say that when a notification is issued under S. 7 (1)(b) of the Act the remedies against the guarantors also stand suspended. In any event the order of the High Court against respondents Nos. 2 to 5 is untenable. See *Bank of Bihar Ltd. v. Damodar Prasad*, 1 SCR 62.

8. Since in the instant case all secured liabilities due to a bank or a financial institution are excluded from the operation of the notification, the suit against respondents No. 1 as well as respondents 2 to 5 remained unaffected by the notification issued by the Central Government. The order of the High Court in the Civil Revision is, therefore, liable to be set aside. We accordingly set aside the orders passed by the High Court against which these appeals are filed and direct the trial Court to proceed with the suit. The appeals are accordingly allowed. Respondents Nos. 1 to 5 shall pay the cost of the appellant.

Appeals allowed



A. P. Sen

Judge

Supreme Court of India

## OBSERVATION

A) U.P. Cane Co-operative Service Regulations (1975), Regn. 68—Termination of services—Compliance of Regn 68—Employee's services terminated for concealment of fact of termination of former services for involvement in corruption case, immediately after receipt of reply to show cause notice—Termination in breach of Regn. 68. Decision of Allahabad Court Reversed.

B) Industrial Disputes Act (14 of 1947), Sch 2 Item 3—Termination of services—whether termination simpliciter—Termination for concealing fact of termination of former services for involvement in corruption case, at the time of applying for post-Order casts stigma—Not order of termination simpliciter—opportunity to defend given—Order is illegal—Decision of Allahabad Court, Reserved. (Constitution of India, Art. 226)

## OBSERVED BY

Mr. A. P. Sen and

Mr. B. C. Ray

Hon'ble Judges, Supreme Court of India

## IN

Civil Appeal No. 821 of 1986, (Arising out of S.L.P. (Civil) No. 13740 of 1985), filed on 11-3-1986 in the case of Jugdish Parsad, Appellant v. Sachiv Zila Ganna Committee, Muzaffarnagar and another, Respondents.

## TEXT

Ray, J. :—Special leave granted.

2. Heard arguments of the counsel for both the parties. The first question for consideration in this appeal is whether the impugned order of termination of service of the appellant is an innocuous order of termination simpliciter in accordance with the terms and conditions of the appointment or it casts any stigma or aspersion on the service career of the appellant by prejudicially affecting his service career. The second question is whe-

ther before passing the impugned order any opportunity of hearing as required under the service regulations was given to the appellant to the making of the said order.

3. The appellant Jagdish prasad was employed as a Clerk in the Office of Zila Ganna Adhikari, Muzaffarnagar in a temporary capacity. By an order dated 28th October, 1976 his service was terminated. The said order of termination is quoted herein below —

“Shri Jagdish prasad, Clerk, Co-ope-



rative Cane Development Society Limited, Muzaffarnagar while working in Roadways was caught in corruption on 6-6-67 and his service were terminated from there. Shri Jagdish parsad obtained his appointment in service in the Society, by concealing the above facts. On receiving a complaint this fact was verified from the Roadways Department. In this way Shri Jagdish Parsad, having been removed on charge of corruption is not suitable for employment in this Society.

Therefore, the services of Shri Jagdish Parsad, Clerk, Cane Society Muzaffarnagar are terminated with immediate effect”.

4. Prior to the making of this order by the Secretary, District Cane Committee, Muzaffarnagar, a show cause notice was issued to the following effect:—

“Having received a complaint against you (from), Transport Corporation, Muzaffarnagar, it has been learnt that you worked up to 6-6-1967 in that department as a Conductor, and during that period you were caught in corruption case, and your services were terminated by giving one month's notice. Since you were removed from the Roadways Department on corruption charges there it was not justified to keep you in this department. Thus it seems that you procured employment in Cane Society, Muzaffarnagar, by concealing the above facts. Therefore, show cause, why you be not removed from services.”

5. This notice was issued on Octo-

ber 13, 1976 under the signature of Secretary, District Cane Committee, Muzaffarnagar. On receipt of this show cause notice, the appellant sent a letter to the Secretary, District Cane Committee, Muzaffarnagar requesting him to supply him all the findings of the enquiry in order to enable him to submit reply to the show cause notice. As the said document asked for by him was not given to him, the petitioner-appellant by his letter dated 30th August, 1976 asked for the said document. It was also stated in the said letter that in spite of his earlier request for the documents, he was merely shown a letter dated 1-7-76 relating to the Roadways Department and another petition for complaint of Shri Shahi Ram, Clerk. Besides, this document neither the findings pertaining to the show cause notice, nor any other documents were made available to him. It has been further stated therein that he was a temporary employee under the U.P. Government Roadways, Muzaffarnagar and his temporary service was terminated by letter No. 3396 dated 18-6-76 by the Assistant General Manager. In the said letter it was clearly mentioned that his services were no more required after offering him one month's salary in lieu of notice. The relevant terms of the letter are as follows:—

“Services of Shri Jagdish Parsad, son of Shri Baru Singh, appointed as Conductor and posted at Muzaffarnagar Station is hereby terminated with immediate effect as he is no longer required. In terms and conditions of his service



**A. P. Sen**  
**Judge**  
**Supreme Court of India**

will get one month's salary in lieu of notice".

6. The appellant sent another letter on October 26, 1976 wherein he stated that since his former service under the U. P. Government Roadways was terminated by the aforesaid order of the Assistant General Manager, U. P. Roadways, certain steps should be taken to ascertain from the Assistant General Manager whether the service of the appellant was terminated by giving one month's salary in lieu of notice as a measure of punishment or he was removed from service on the allegation of corruption. Immediately, thereafter on 28th October, 1976 the impugned order of termination of service of the appellant was made by the Secretary, District Cane Committee, Muzaffarnagar.

7. The petitioner-appellant moved against this order before the High Court of Judicature at Allahabad questioning the legality and validity of the said order on the ground that he has not been given the proper opportunity of hearing and nor the procedure prescribed by Regulation 68 of the U. P. Cane Co-operative Service Regulations 1975 was complied with. As such the entire order of termination is wholly illegal, arbitrary, being violative of the aforesaid Regulation 68 as well as denying the appellant the opportunity to show cause against the proposed punishment as provided under the said regulation. Learned Judges of the High Court of Judicature at Allahabad dismissed the Writ Petition holding that there was no merit in the

submission of the learned counsel as no disciplinary departmental proceedings were taken against the petitioner-appellant, it was also found that the service of the appellant was terminated by U. P. Government Roadways on charge of corruption as he concealed this fact while obtaining service in the District Cane Office. He was issued a show cause notice and he showed the cause. The Cane Officer after considering his reply passed the impugned order terminating his service. There was no procedural flaw or breach of statutory rules.

8. It appears from the order dated 18th May, 1967 issued under No. 3396-E-1167 by the Assistant General Manager, U. P. Government Roadways that the service of the appellant was terminated as he was no longer required on offering him one month's salary in lieu of notice in accordance with the terms and conditions of his service. From this letter there is nothing to show that the service of the petitioner-appellant was terminated because he was involved in a corruption case. It also appears from the show cause notice dated 30th October, 1975 that the appellant was caught in a corruption case and his former service under the Transport Corporation, Muzaffarnagar was terminated by giving one month's notice. It was further stated therein that since he was removed from the Roadways Department on corruption charges, it was not justified to keep him in this department. As such he should not be removed from service. Two rep-



lies given to this show cause notice by the appellant has already been referred to previously wherein the appellant has categorically denied that he was proceeded against by the U. P. Roadways Department, Muzaffarnagar on a charge of corruption and he being a temporary employee was removed from the service by giving him one month's pay in accordance with the terms and conditions of his service. In the counter affidavit sworn by P. L. Sharma, the Secretary of the Respondent No. 1 on behalf of Respondents Nos. 1 and 2 it has been stated in paragraphs 1 and 2 of the said affidavit that the appellant was an ex-employee of U. P. Road Transport Corporation, and he did not intimate the Cane Development Union that his service was terminated by the U. P. Roadways on a charge of corruption and bribery on 6-6-1967. It was also stated therein that this fact was brought to the notice of the respondent on a complaint made by one Shri Shahi Ram, Clerk. A copy of the report of the Station Officer, U. P. Government Roadways, Muzaffarnagar was also filed along with the said counter affidavit. Except of the said report are quoted herein below :—

“Till 6-6-66, he was employed as a Conductor. However on that date he was caught red handed in a case of corruption. He was given one month's salary in lieu of notice and removed from the department on 6-6-67.”

9. The order of termination was made by the Secretary, District Cane Committee, Muzaffarnagar on October

28, 1976 immediately after the receipt of the reply to the show cause notice by the petitioner appellant. There is nothing to show that the petitioner appellant was provided with the relevant documents showing that a proceeding was started against him for his involvement in a corruption case while in the office of the U. P. Government Roadways, nor the Assist. General Manager of the said Roadways who passed the order of termination of service simpliciter on the basis of the terms and conditions of service after offering him one month's salary in lieu of notice was examined. It is needless to say in such circumstances that barring the issuance of the show cause notice, the elaborate procedure prescribed by Regulation 68 of the U. P. Cane Co-operative Service Regulations 1976 was not followed. On a plain reading of this regulation, it is quite clear and apparent that the petitioner-appellant has to be communicated the charges in writing as well as the statements of allegations forming the basis of each of the charges and the evidence proposed to be considered in support of each of the said charges. Then the delinquent employee has to be called upon by the Enquiry Officer to submit his explanation in writing in respect of each of the charges within the prescribed time and he has to be asked whether he desires to be heard in person or to produce any evidence documentary or oral or to examine or cross-examine any witness of his defence. He will have to be given inspection of the



want records if he so desires. The regulation further provides that the delinquent employee has to be given a personal hearing and he will be allowed to cross-examine the witness if he so wishes. The Enquiry Officer after hearing the delinquent employee and examination of the witnesses produced by him in his defence should submit his report to the disciplinary authority giving his findings on each of the charges and recommending the punishment. The Competent Authority if proposes to dismiss the officer or to remove or reduce him in rank, has to give him another opportunity against the proposed punishment. Thereafter the final order imposing the punishment can be made. This elaborate procedure has not at all been followed or adhered to in the instant case. It is evident that the appellant was not given any opportunity of hearing at all before making the impugned order of termination of his service on the ground that he concealed the fact of his removal from the service under the U. P. Government Roadways on charge of corruption at the time when he applied for the post of Clerk under the Cane Cultivation Society, Muzaffarnagar. This order of termination is not an innocuous order, it is an order which on the face of it casts stigma on the service career of the appellant and it is in effect an order of termination on the charges of concealment of the facts that he was removed from his earlier service under the U. P.

Roadways on charges of corruption. This order undoubtedly is penal in nature having civil consequences and it also prejudicially affects his service career. Furthermore this order of termination if considered along with the show cause notice will clearly reveal that the order of termination in question is not an innocuous order made for doing away with the service of the temporary employee like the petitioner-appellant in accordance with the terms and conditions of his service. This order is, therefore, per se, illegal, arbitrary and in breach of the mandatory procedure prescribed by Regulation 68 of the U. P. Cane Co-operative Service Regulations 1975. The order made is also in utter violation of the principles of audi alteram partem. The findings of the High Court that no disciplinary departmental proceedings have been taken against the petitioner-appellant and the petitioner was afforded opportunity before his service was terminated are liable to set aside inasmuch as these findings were arrived at without at all considering the relevant materials produced before the Court.

10. In the premise aforesaid, there is no other alternative, but to quash and set aside the impugned order passed by the Court below. This will not prevent the authorities concerned to proceed against the appellant afresh in accordance with law. There shall be no order as to costs.

Appeal allowed.



IT IS THE ESSENCE OF DEMOCRACY  
TO OBEY  
NO MASTER BUT THE LAW



**E. S. Venkataramiah**  
**Judge**  
**Supreme Court of India**

### OBSERVATION

**Administrative order—Validity—Granting exemption in favour of Govt. companies and Co-operative Societies—Classification is reasonable—Power arbitrary and has to be exercised in public interest. OP. Nos. 6, 7, 1005, 1153, and 1345 of 1981, D/- 15-4-1981, (Ker) Reversed. (Constitution of India, 4) Kerla Eorest Produce (Fixation of Selling Price) Act (29 of 1978) S. 6.**

### OBSERVED BY

**Mr. E. S. Venkataramiah and**  
**Mr. M. P. Thakkar**  
**Hon'ble Judges, Supreme Court of India.**

### IN

**Civil Appeal No. 1871-76 of 1981 decided on 16-4-1986 in the case of Hindustan Corporation Ltd. Appellant v. Government of Kerala and others, Responde-**

### TEXT

**Venkataramiah, J.:**—In these appeals special leave we are concerned with question of constitutional validity of section 6 of the Kerala Forest Produce (Fixation of Selling Price) Act, 1978 (Act 29 of 1978) (hereinafter referred to as 'the

Act. The appellant Hindustan Paper Corporation Ltd is a company owned by the Central Government carrying on business of manufacturing newsprint at its factory in the State of Kerala. An agreement was entered into between the appellant Hindustan Paper Corporation and the Government of Kerala on October 7, 1974 under which the Government of Kerala agreed to gra-

nt to the appellant the right of free use of water from the Muvattupuzha river for purpose of manufacturing newsprint the and also to make available annually to the appellant 1,50,000 tonnes of eucalyptus wood. The Government of Kerala further agreed to keep reserved from the date of agreement the State Plantations of eucalyptus grandis in Pamba, Kattayam, Punalur, Thenmalai and Trivandrum Forest Divisions as constituted then for the appellant and not to permit harvesting of eucalyptus wood and reeds by other parties and for the regeneration of the forest in the areas, the Chief Conservator of Forests, Kerala State was required in consultation with the appellant to prepare and implement a



scientific management plan which would include fire-protection and epidemic control programmes. The appellant agreed to pay to the Government of Kerala royalty for the raw materials supplied to the appellant at the rate of Rs. 11/- per tonne of green wood of *eucalyptus grandis* and *eucalyptus tereticornis* (both with 50 per cent moisture) and at the rate of Rs. 12/- per tonne of green reads with 50 per cent moisture. There were several other conditions in the agreement with which we are not concerned in these cases. After the above agreement was entered into the appellant established its factory. The Punalur Paper Mills Ltd and the Gwalior Rayong Silk Manufacturing (Wvg.) Co. Ltd. which were companies in the private sector had also established their factories in the State of Kerala which consumed forest produce as raw material. The Kerala State Bomboo Corporation Limited and the Travancore plywood Industries Limited which were owned by the Government of Kerala were also carrying on business in the State of Kerala.

3. In the year 1978 the Act was passed by the Kerala Legislature with the object of providing for the procedure to be followed in fixing the selling prices of certain important forest produce, for the prohibition of the sale of such forest produce at less than the prices so fixed and for matters incidental or ancillary thereto. The Act was also intended to provide for the proper regeneration and maintenance of the forests in the State. The Act governs only those forests

which are considered as reserved forests within the meaning of Kerala Forest Act, 1961 and forests vested in the Government under Section 3 of the Kerala Private Forests (Vesting and Assignment) Act, 1971. It provides for the determination of the selling price of certain forest produce specified in Clause (o) of Section 2 of the Act. Section 3 of the Act requires the Government to notify in the Gazette before the end of each financial year the selling price of every forest produce for the following financial year. The notified price has to be fixed by the Government after taking into consideration recommendation of the Expert Committee consisting of the officers mentioned in Section 4 of the Act, Sub-Section (3) of Section 5 of the Act requires the Expert Committee to make its recommendation having regard inter alia to the market price of the forest produce, the cost of regeneration and maintaining the forest produce in cases where regeneration is necessary after selling the forest produce; and such other matters as may be prescribed. Section 5 is the crucial section in the Act. It reads as follows :

“5. Forest produce to be sold at a price not less than the selling price—

(1) After the date of the publication of the notification under sub-section (2) of Section 3 no forest produce shall be sold by the Government or any forest officer at a price which is less than the selling price of that forest produce.

(2) The sale of any forest produce in contravention of sub-section (1) shall



null and void and shall not be enforceable in a Court of law.”

4. There is no prohibition of sale of forest produce at prices higher than prices mentioned in the notification. Section 7 of the Act provides that 10 per cent of the amount obtained by the sale of forest produce after the commencement of the Act, subject to such conditions as may be made under the Act, shall be set apart for being utilised for the development of forest. Section 8 enables the Government to make rules for the purpose of carrying in to effect the provisions of the Act. We are concerned in these cases with the validity of Section 6 of the Act which reads thus :

“6. Exemption—The Government may, in the public interest, by notification in the Gazette, exempt the sale of any forest produce—

(a) to any company owned by the Central Government of the Government of Kerala;

(b) not exceeding ten cubic metres to any co-operative society registered or deemed to be registered under the Kerala Co-operative Societies Act, 1969 (of 1969).

from the provisions of Section 5, subject to such conditions and restrictions as may be specified in the notification.”

5. The Act came into force on its publication, i.e. on September 26, 1978. On March 9, 1979 the Government of Kerala published a notification exempting the appellant, i.e. Hindustan Paper Corporation Ltd., the Kerala State

Bamboo Corporation Limited and the Travancore Plywood Industries Limited from the provisions of Section 5 of the Act. The relevant part of the Notification and the Explanatory Note attached to it are given below:

“No. G. O. (MS) 100/79/AD Dated, Trivandrum 9th March, 1979.

S. R. O. No. 313-79:— In exercise of the power conferred by Section 6 of the Kerala Forest Produce (Fixation of Selling Price) Act, 1978 (29 of 1978), the Government of Kerala, being satisfied that it is necessary so to do in the public interest, hereby exempt the sale of any forest produce to the Kerala Newsprint Project under the Hindustan Paper Corporation. The Kerala State Bamboo Corporation and the Travancore Plywood Industries, Punalur from the provisions of Section 5 of the said Act.

By order of the Governor  
K. V. Vidhyadharan

Additional Secretary to Govt.  
Explanatory Note

After Government have notified selling price of Forest Produce under Section 3 of Act 29 of 1978. Forest Produce cannot be sold at prices less than the selling price. Under Section 6 of the Act, Government can exempt in public interest, by Notification, the sale of any Forest Produce to companies owned by the Central Government by Government of Kerala. As Kerala Newsprint Project, Bamboo Corporation and the Travancore Plywood Industries, Punalur are undertakings of



the Central Government and the Government of Kerala respectively, it is considered expedient to exempt these from the provisions of Section 5 of the Act. The Notification is intended to achieve the above purpose”.

6. The State Government issued the Notification under Section 3 of the Act fixing the price below which forest produce covered by the Act could not be sold. Aggrieved by the Notification granting exemption to the Government companies, the two companies in the private sector, namely, Punalur Paper Mills Limited and the Gwalior Rayong Silk Manufacturing (Wvg.) Co. Ltd. filed writ petitions in the High Court questioning the constitutional validity of Section 6 and the Notification granting exemption thereunder in favour of the appellant Hindustan Paper Corporation Ltd. and two other companies owned by the Government of Kerala. The writ petitions were opposed by the Government of Kerala, the appellant Hindustan Paper Corporation Ltd., the Kerala State Bamboo Corporation Ltd. and the Travancore Plywood Industries Ltd. In the counter-affidavit filed on behalf of the Government of Kerala the contentions urged by the petitioners in the writ petitions were refuted and the State Government took the stand that Section 6 of the Act was constitutionally valid. At the hearing of the writ petitions before the High Court, the Additional Advocate General who appeared for the State Government conceded that in his opinion Section 6 of the Act was unconstitutional. Perhaps

what he meant was that he was unable to offer any good answer to the contentions urged by the other side in support of the challenge to the constitutionality of the concerned provision. A reference to this concession which was neither here nor there is found at the end of paragraph 22 of the judgement of the High Court. The High Court held that S. 6 of the Act was violative of Art. 14 of the Constitution and struck it down along with the Notification. No appeal was filed by the State Govt. The above appeals are filed by the Hindustan Paper Corporation Ltd. the appellant herein which is one of the beneficiaries of the Notification granting exemption. But, at the hearing of these appeals in this Court the learned counsel for the Government of Kerala stated that the concession made by the learned counsel for the State before the High Court was incorrect, and supported the validity of Section 6 of the Act and the Notification granting exemption issued thereunder.

7. These appeals are filed against the judgement of High Court after obtaining the leave of this Court under Article 136 of this Constitution. Section 6 of the Act has already been set out above. It confers the power on the State Government to grant exemption from the provisions of Section 5 of the Act. The power conferred under Section 6 of the Act is not unfettered. The Government can grant the exemption only in the public interest. Such exemption can be granted only to a company owned by the



al Government or the Government  
 erala. There is also, however, a  
 sion in Clause (b) of Section 6 of  
 Act, which understandably has  
 been struck down by the High  
 t, even though its validity had not  
 expressly challenged. Under this  
 sion any sale of forest produce  
 exceeding ten cubic meters effected  
 in favour of any co-operative society  
 entered or deemed to be registered  
 deemed to be registered under the  
 la Co-operative Societies Act,  
 may be exempted from Section 5  
 ct by the State Government. While  
 ng the not notification granting  
 option it is open to the State Gove-  
 nt to impose appropriate condi-  
 s and restrictions. The State Gove-  
 nt, of course, has to bear in mind  
 entire policy and object of the Act  
 re exercising its power under Sec-  
 6 of the Act. At the outset it sho-  
 be observed that the decision of the  
 n Court to the extent it has quashed  
 use (b) of Section 6 of the Act  
 ch gave power to the State Govern-  
 t to exempt the sale of any forest  
 duce in small quantities not exceed-  
 10 cubic meters to any co-operative  
 ety is liable to be set aside straight-  
 without anything more as there was  
 challenge to that part of the section  
 ll and the High Court has not at all  
 tinized the constitutional validity  
 his provision.

8. The reasons given by the High  
 rt for quashing Section 6 of the Act  
 these :

(1) if the Government is given a

power to sell the produce at a lower  
 price than the notified rate to the  
 Government companies it will enable  
 the Government to cripple or in slow  
 degrees to eliminate the other consum-  
 ers in the field. This conferment of  
 power on the State Government is  
 discriminatory and unreasonable.

(2) a Government company is as  
 such a legal entity as any other entity.  
 It is a commercial corporation acting  
 on its own behalf and all consumers of  
 the forest produce should have an equal  
 opportunity to get the goods. The  
 Government company could not, there-  
 fore, be given any favour.

(3) there is no nexus between the  
 object to be achieved by the Act and  
 the exemption to be granted in favour  
 of the Government companies, and

(4) the submission made by the  
 Additional Advocate General to the  
 effect that he could not support the  
 validity of Section 6 of the Act.

9. We find it difficult to accept  
 the grounds on which the High Court  
 has held Section 6 of the Act to be  
 unconstitutional. So far as consumers  
 of forest produce who are not granted  
 any exemption under Section 6 of the  
 Act are concerned, any sale of forest  
 produce in their favour cannot be effec-  
 ted at a price less than the price notified  
 under Section 3 of the Act. The notified  
 price has to be fixed on the basis of  
 the recommendation to be made by the  
 Expert Committee constituted under  
 Section 4 of the Act and the Expert  
 Committee is required to take into



consideration the market price of the forest produce, the cost of regenerating and maintaining the forest produce in cases where regeneration is necessary after selling the forest produce and such other matters as may be prescribed. If Section 5 of the Act provides that the forest produce covered by the Act shall not be sold at a price less than the price which is determined on the basis of the factors referred to above which appear to be quite relevant they cannot have any grievance. They cannot claim that they must be shown any concession and that the forest produce should be made available to them at a price which would be lower than the market price. Even when it is stated that any company owned by the Central Government or the Government of Kerala or a co-operative society (subject to the limit as regards the quantity of forest produce without the constraint contained in Section 5 of the Act, it does not mean that the forest produce would be made available to them at throw-away prices. It is reasonable to expect that the price payable for the forest produce in question by the Government companies or co-operative societies would be determined after negotiations having regard to the public interest. In almost all the statutes by which the fiscal or economic interests of the State are regulated, provision for granting exemption in appropriate cases would have necessarily to be there and the power to grant exemption is invariably conferred on the Government concerned. The Legislature which is burdened with heavy

legislative and other types of work is not able to find time to consider in detail the hardships and difficulties that are likely to result by the enforcement of the statute concerned. It has, therefore, now become a well-recognised and constitutionally accepted legislative practice to incorporate provisions conferring the powers of exemption of the Government in such statutes. Such exemption cannot ordinarily be granted secretly. A notification would have to be issued and published in the Gazette and in the ordinary course it would be subject to the scrutiny by the Legislature. The power can be exercised only in the public interest as provided by the section itself. The validity of provisions conferring the power of exemption has been consistently upheld by this Court in a number of decisions commencing with the State of Bombay v. F. N. Balsara 1951 SCR 682 : (AIR 1951 SC 318). The next question is whether Section 6 of the Act which restricts the power of the Government to grant exemption to companies owned by the Central Government or the Government of Kerala and to co-operative societies only is valid. As far as Government undertakings and companies are concerned, it has to be held that they form a class by themselves since any profit that may make would in the end result in the benefit to the members of the general public. The profit, if any, enriches the public officer and not the private officer. The role of industries in the public sector is very sensitive and critical from the point of view of national economy.



**E. S. Venkataramiah**  
**Judge**  
**Supreme Court of India**

survival very often depends upon budgetary provision and not upon the resources which are available to the industries in the private sector. They are often established to break the cycle of strangulation on economy. The industries in private sector have developed and may be using to check the industrial growth of the country. An exemption or a concession may provide them some breathing space or settling down time. It may be regarded as a subsidy at the worst. This appears to be the policy behind Article 19(1)(ii) of the constitution. In appropriate cases in order to place an industry owned by the Government on a footing of parity basis in the national interest, a concession may have to be shown. It is neither alleged nor established that if the exemption is annulled the owners will be richer by a single rupee or if it is retained they will be poorer by a single paisa. The only purpose hinted at is that if the public sector is made to pay more, it may use the material which in turn might be available to the private sector. Not a commendable purpose to say the least. The action of the State Government in exempting the Government companies from the operation of Section 5 of the Act does not in the instant case amount to the exclusion of industries in the private sector from doing business nor does it deny the supplies of forest produce used as raw material by these industries as alleged by them. The Government is not shown to be taking any undue advantage

of the monopoly it enjoys as the owner of the forest and the position it holds as the sole supplier of forest produce in fixing the minimum prices in order to preserve the national wealth from being wasted away. In the circumstances of this case it cannot be said that the provision is either arbitrary or unreasonable even though the Government industries may be rivals in trade to the industries in the private sector. In *Sher Singh v. Union of India* (1984) 1 SCR 464 this Court has upheld Section 47 (IH) of the Motor vehicles Act, 1939 under which a statutory preference is shown to a State Transport Undertaking. In *Viklad Coal Merchant Patiala v. Union of India* (1984) 1 SCR 657 the preference shown to the Government in allotment of railway wagons for transporting coal has been upheld. Learned counsel for the respondents however depended upon the decision of this Court in *State of Rajasthan v. Mukanchand* (1964) S SCR 903 by which an exemption granted in respect of debts due to the State or a scheduled bank from the operation of Section 2 (e) of the Jagirdar's Debt Reduction Act, 1937 was held to be not in conformity with the object of the Act and so violative of Article 14 of the Constitution. That case depended on the facts and circumstances surrounding the statute in question. We may refer here to the decision of this Court in *Fatechand Himmatlal v. State of Maharashtra* (1977) 2 SCR 828. Where it is observed.

“There is no merit in the plea Lia-



bilities due to government to local authorities are not tainted with exploitation of the debtor. Likewise, debts due to banking companies do not ordinarily suffer from overreaching, unscrupulousness or harsh treatment. Moreover, financial institutions have, until recently, treated the village and urban worker and petty farmer as untouchables and so do not figure in the picture. To exempt the categories above referred to is reasonable."

10. Hence, preference shown to Government companies under Section 6 of the Act cannot be considered to be discriminatory as they stand in a different Class altogether and the classification made between Government companies and others for the purposes of the Act is a valid one. Same is the case with the clause which gives power under Section 6 of the Act to the Government to exempt sales of goods to produce in favour of co-operative societies up to the limit mentioned therein. In *P. V. Sivarajan v. Union of India* (1959) Suppl (1) SCR 779 : the exemption granted in favour of traders carrying on export business in a small scale who formed co-operative societies was upheld. In *Orient Weaving Mills (P) Ltd. v. Union of India* (1962) Suppl (3) SCR 481 this Court upheld the exemption granted in favour of powerloom weavers in a co-operative society from the levy of central excise duties. We do not find any substance in the contention that the provision granted exemption in favour of Government companies and the co-operative societies

as stated above is unconstitutional. We must, however, express our disapproval of one of the reasons given by the High Court for striking down Section 6 of the Act, namely, "private sector consumers generally show more concern in the speedy production of goods in the finished products and in the sale of them which is in public interest as well". The above observation is unwarranted and is presumably based on the personal opinion of the learned judges. It is misleading and cannot, in the circumstances of the case, serve as a prop to support the contention of the respondents.

11. Therefore, the decision of the High Court that Section 6 of the Act was violative of Article 14 of the Constitution is liable to be set aside. We do not also approve of the finding of the High Court that even assuming that the section was valid, the notification issued thereunder was invalid. It may be stated here that the writ petitioners on whom the burden lay have not given any valid reason as to why we should hold that the impugned notification was not in the public interest. As mentioned earlier the appellant, Hindustan Paper Corporation Ltd. established a factory after entering into an agreement with the State Government as regards the regular supply of raw material from the forests in the State of Kerala for production of newsprint and that the said factory was employing a large labour force. The other two concerns in whose favour the exemption was granted by the impugned notification



ort No. 53, p. 09

**E. S. Venkataramiah**  
**Judge**  
**Supreme Court of India**

the concerns of Kerala Government  
f. We have no material in this case to  
that the impugned notification  
not in the public interest. We accor-  
gly set aside the finding recorded by  
High Court on the validity of the no-  
ation also.

12. In the result, we allow the appe-  
als, set aside the judgement of the High  
Court and dismiss the writ petitions filed  
in the High Court. There shall, however,  
be no order as to costs.

Appeals allowed.



**IT IS THE ESSENCE OF DEMOCRACY  
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## OBSERVATION

(A) Constitution of India, Art. 12—Expression, 'the State' in Art. 12—Interpretation of—Definition of expression 'the State' in Art. 12 being for purposes of Part III and Part IV expression is not confined to its ordinary and constitutional sense as extended by inclusive portion of Art. 12 but used in the context of the State in relation to Fundamental Rights guaranteed by Part III and Directive principles of State Policy contained in Part IV which are declared in Art. 37 to be fundamental to governance of the Country (Interpretation of Art. 12—Inclusive definition)

(B) Constitution of India, Art. 12—"The State"—Central Inland Water Transport Corporation Ltd—Though Govt. Company under S. 617 of Companies Act is "the State" within meaning of Art. 12 (Companies Act (1956), S. 617).

(C) Constitution of India, Arts 14, 39 (a), 41 and 226—Central Inland Water Transport Corporation Ltd. Service Discipline and Appeal Rules (1979), R. 9 (B) empowering Corporation to terminate services of permanent employees without giving any reason and by giving notice—It is void under S. 14 of Contract Act as being opposed to public Policy—It is also ultra vires of Arts 14 of Constitution and also violative of Directive Principles contained in Arts 39 (a) and 41—However, right to resign is not void, Contract Act (9 of 1932), S. 23. 1986 Lab IC 494 (Cal), partly Reversed.

(D) Contract Act (9 of 1982), S. 23—Expression 'Opposed to Public Policy'—Not defined in Contract Act—Scope of transactions falling thereunder varies with time to time.

(E) Constitution of India, Arts 14, 226—It is not only cases to which Art. 226 applies that rules of natural justice come into play.

(F) Central Inland Water Transport Corporation Ltd. Service Discipline and Appeal Rules (1979), Rr. 1, 9 (i)—Applicability—Officers of Rivers Steam Navigation Company Ltd. whose services were taken over by Corporation under Scheme of Arrangement sanctioned by Calcutta High Court—Employees employed mainly in managerial capacity—No Separate orders issued by Board of Directors in their case—They are governed by Rules.

## OBSERVED BY

Mr. A. P. Sen and Mr. D. P. Madon  
Hon'ble Judges, Supreme Court of India.

## IN

Civil Appeals Nos. 4412 and 4413 of 1985, decided on 6-4-1986 in the case of Central Inland Water Transport v. Brojo Nath Ganguly and another, Respondents.

And



Central Inland Water Transport Corporation Ltd and another, Appellants v. Tanti and another, Respondents.  
Kanti Sengupta and another, Respondents.

### TEXT

Madon, J :—These Appeals by Special Leave granted by this Court raise two questions of considerable importance to Government companies and their employees including their officers. These questions are :

(1) Whether a Government company as defined in S. 617 of the Companies Act, 1956. is “the State” within the meaning of Art. 12 of the Constitution ?

(2) Whether an unconscionable term in a contract of employment is void under S. 23 of the Indian Contract Act, 1872, as being apposed to public policy and, when such a term is contained in contract of employment entered into with a Government company, is also void as infringing Art. 14 of the Constitution in case a Government company is “the State” under Art. 12 of the Constitution ?

2. Although the record of these Appeals is voluminous, the salient facts lie within a narrow compass. The First Appellant in both these Appeals, namely, the Central Inland Water Transport Corporation Limited (hereinafter referred to in short as “the Corporation”), was incorporated on February 22, 1967. The majority of the shares of the Corporation were at all times and still are held by the Union of India which is the Second Respondent in these Appeals, and the remaining shares were and are

held by the State of West Bengal and the State of Assam. Section 617 of the Companies Act, 1956 (Act No. 1 of 1956) provides as follows :

“617. Definition of Government Company”—

For the purposes of this Act Government Company means any company in which not less than fifty-one per cent of the paid-up share capital is held by the Central Government, or by a State Government or Governments, partly by the Central Government and partly by one or more State Governments and includes a company which is a subsidiary of a Government company as thus defined.” As all the shares of the Corporation are held by different Governments, namely, the Government of India and the Governments of West Bengal and Assam, the Corporation is not only a Government company as defined by the said S. 617 but is a company wholly owned by the Central Government and two State Governments.

3. Clause III (A) of the Memorandum of Association of the Corporation lists the main objects of the Corporation and clause III (B) of the Memorandum of Association lists the objects incidental or ancillary to the main objects. It is unnecessary to reproduce all these objects for according to the Petitions filed by the Corporation obtained



Special Leave in these Appeals, it is presently engaged in carrying out the following activities, namely.

(i) maintaining and running river steamer with ancillary function of maintenance and operation of river-site jetty terminal;

(ii) constructing vessels of various sizes and descriptions;

(iii) repairing vessels of various sizes and descriptions; and

(iv) undertaking general engineering activities.

4. Article. 4 of the Articles of Association of the Corporation provides that the Corporation is a private company within the meaning of Clause (b) of sub-section (1) of S. 3 of the Companies Act and that no invitation to be issued to the public to subscribe for any shares in, or debentures or other securities of, the Corporation. Article 51 of the Articles of Association vests upon the President of India the power to issue from time to time such directions or instructions as he may consider necessary in regard to the management or the conduct of the business of the Corporation or of the Directors thereof. The said Article also confers upon the President the power to issue such directions or instructions to the Corporation as to the exercise and performance of its functions in matters involving national security or public interest. Under the said Article, the Directors of the Corporation are bound to comply with and give immediate effect to such directions and instructions

Under Art. 51A, the President has the power to call for such returns, accounts and other information with respect to properties and activities of the Corporation as might be required from time to time. Under Art. 40, subject to the provisions of the Companies Act and the directions and instructions issued from time to time by the President under Art. 51, the business of the Corporation is to be managed by the Board of Directors. Under Art. 14 (a), subject to the provisions of S. 252 of the Companies Act, the President is to determine in writing from time to time the number of Directors of the Corporation which, however, is not to be less than two or more than twelve and under Art. 14 (b), at every annual general meeting of the Corporation, every Director appointed by the President is to retire but is eligible for re-appointment. Under Art. 15 (a), the President has the power at any time and from time to time to appoint any person as an additional Director. Under Art. 16, the President has the power to remove any Director appointed by him from office at any time in his absolute discretion. Under Art. 17, the vacancy in the office of a Director appointed by the President caused by retirement, removal, resignation, death or otherwise, is to be filled by the President by fresh appointment. Article 18 provides that the Directors are not required to hold any share qualification. Under Article 37, the President may from time to time appoint one of the Directors to the office of the Chairman of the Board of Directors or to the office of the Mana-



ging Director or to both these offices for such time and such remunerations as the President may think fit and the President may also from time to time remove the person or persons so appointed from service and appoint another or others in his or their place or places. Under Art. the Chairman of the Board has the power, on his own motion, and is bound, when requested by the Managing Director in writing, to reserve for the consideration of the President the matters relating to the working of the Corporation set out in the said Article. Article 42 lists the matters in respect of which prior approval of the President is required to be obtained. Under Article 47, the auditor auditors or the Corporation are to be appointed or re-appointed by the Central Government on the advice of the Comptroller and Auditor-General of India. The said Article also confers power upon the Comptroller and Auditor-General of India to direct the manner in which the accounts of the Corporation are to be audited and to give the auditors instructions in regard to any matter relating to the performance of their function. Under the said Article, he has also the power to conduct a supplementary or test audit of the accounts of the Corporation by such person or persons as he may authorize in that behalf and for the purposes of such audit to require such information or additional information to be furnished to such person or persons on such matters by such person or persons as the Comptroller and Auditor-General may, by general or special order, direct.

2. Under Clause (v) of the Memorandum of Association, the authorized share capital was rupees four crores. It was raised to rupees ten crores by a special resolution passed at the Annual General Meeting of the Corporation held December 30, 1972, and further raised to rupees twenty crores by a special resolution passed at the Annual General Meeting held on November 5, 1979.

6. The above facts and the provisions aforementioned of the Memorandum of Association and the Articles of Association clearly show that not only is the Corporation a Government company of which all the shares were and are owned by the Central Government and two State Governments but it is a Government company which is under the complete control and management of the Central Government.

7. A company called the 'River Steam Navigation Company Limited' was carrying on very much the same business including the maintenance and running of river service as the Corporation is doing. A Scheme of Arrangement was entered into between the said Company and the Corporation. The Calcutta High Court by its dated May 5, 1967, approved the said Scheme of Arrangement and ordered the closure of the said Company and further directed that upon payment to all the creditors of the said Company the said Company would stand dissolved without winding up by an order to be obtained from the High Court and accordingly, upon payment to all the creditors, the said



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any was ordered to be dissolved. said Scheme of arrangement provided that the assets and certain liabilities of the said Company would be taken over by the Corporation. The said Scheme of Arrangement as approved by the High Court also provided as follows :

(a) That the new Company shall take over as many of the existing staff or employees as possible and as can be reasonably taken over by the said transferee Company subject to any valid objection by any individual employee or employees.

(b) That as to exactly how many can be employed it is left to the said transferee Company's bona fide discretion.

(c) That those employees who cannot be taken over shall be paid by the transferor Company all moneys due to them under the law and all legitimate legal compensations payable, to them either under Industrial Disputes Act or otherwise legally admissible and such moneys shall be provided by the Government of India to the existing transferor Company who will pay these moneys.

3. The First Respondent in Civil Appeal No. 4412 of 1985, Brojo Nath Guha, was, at the date when the said Scheme of Arrangement became effective, working in the said Company and his services were taken over by the Corporation and he was appointed on September 8, 1967, as a Deputy Chief Accounts Officer. The First Respondent in Civil Appeal No. 4413 of 1985, Kanti Sen gupta, was also work-

ing in the said Company and his services were also taken over by the Corporation and he was appointed on September 8, 1967, as Chief Engineer on the ship "River Ganga". It is unnecessary to refer at this stage to the terms and conditions of the letters of appointment issued to these two Respondents as they have been subsequently superseded by service rules framed by the Corporation except to state that under the said letters of appointment the age of superannuation was fifty-five years unless the Corporation agreed to retain them beyond this period. The said letters of appointment also provided that these Respondents would be subject to the service rules and regulations including the conduct rules. Service rules were framed by the Corporation for the first time in 1970 and were replaced by new rule in 1971.

9. We are concerned in these Appeals with the "Central Inland Water Transport Corporation Ltd. Service Discipline and Appeal Rules" of 1979 framed by the Corporation. These rules will hereinafter be referred to in short as "the said Rules". The said Rules apply to all employees in the service of the Corporation in all units in West Bengal, Bihar, Assam or in other state or Union Territory except those employees who are covered by the Standing Orders under the Industrial Employment (Standing Orders) Act, 1946, or those employees in respect of whom the Board of Directors has issued separate orders. Rule 9 of the said Rules deals with termination of employment for acts other than misdemeanour.



The relevant provisions of the said Rule 9 relating to permanent employees are follows:

“9. Termination of Employment for Acts other than Misdemeanour.

(i) The employment of a permanent employee shall be subject to termination on three months, notice on either side. The notice shall be in writing on either side. The Company may pay the equivalent of three months' basic pay and dearness allowance, if any, in lieu of notice or may deduct a like amount when the employee has failed to give due notice.

(ii) The services of a permanent employee can be terminated on the grounds of “Services no longer required in the interest of the Company” without assigning any reason. A permanent employee whose services are terminated under this clause shall be paid 15 days basic pay and dearness allowance for each completed year of continuous service in the Company as compensation. In addition he will be entitled to encashment of leave at his credit.”

Under Rule 10, an employee is to retire on completion of the age of fifty-eight years though in exceptional cases and in the interest of the Corporation, an extension may be granted with the prior approval of the Chairman-cum-Managing Director and the Board of Directors. Rule 11 provides as follows:

“11. Resignation.—

Employees who wish to leave the Company's services must give the Com-

pany the same notice as the Company is required to give them under Rule 9.”

Rule 33 provides for suspension of an employee where a disciplinary proceeding against him is contemplated or is pending or where a case against him is pending in respect of any criminal offence under investigation or trial. Rule 34 provides for payment of subsistence allowance during the period of suspension. Rule 36 sets out the different penalties which can be imposed on an employee for his misconduct. These penalties are divided into minor and major penalties. Rule 37 is as follows:

“37. Acts of Misconduct —

Without prejudice to the general meaning of the term ‘misconduct’ the Company shall have the right to terminate the services of any employee at any time without any notice if the employee is found guilty of any insubordination, intemperance or other misconduct or any breach of any rules pertaining to service or conduct or non-performance of his duties.”

Rule 38 prescribes the procedure for imposing a major penalty and sets out in detail how a disciplinary is to be held. Rule 31 provides for action to be taken by the disciplinary authority on the report made by the Inquiring Authority. Rule 40 prescribes the procedure to be followed for imposing minor penalties. Rule 43 provides for a special procedure to be followed in certain cases. This special procedure consists of dispensing with a disciplinary inquiry altogether. The said Rule 42 provides as follows:



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Notwithstanding anything contained in Rule 38, 39 or 40 the disciplinary authority may impose any of the penalties specified in Rule 36 in any of the following circumstances :—

(i) The employee has been convicted on a criminal charge, or on the strength of facts or conclusions arrived at in a judicial trial; or

(ii) where the disciplinary authority is satisfied for reasons to be recorded by it in writing that it is not reasonably practicable to hold an inquiry in the manner provided in these Rules; or

(iii) where the Board is satisfied that in the interest of the security of the Corporation/Company, it is not expedient to hold any inquiry in the manner provided in these rules.”

Rule-45 provides for an appeal against an order imposing penalty by the appropriate authority specified in the Schedule to the said Rules and Rule 45-A provides for a review.

10. We are concerned in these appeals with the validity of clause (i) of Rule 9 only.

11. So far as Ganguly, the First Respondent in Civil Appeal No. 4412 of 1985 is concerned, he was promoted to the post of Manager (Finance) in October 1980 and also acted as General Manager (Finance) from November 1980 to March 1982. On February 16, 1983, a confidential letter was sent to

him by the General Manager (Finance), who is the Third Appellant in Civil Appeal No. 4412 of 1985, to reply within twenty-four hours to the allegation of negligence in the maintenance of Provident Fund Accounts, Ganguly made a representation as also gave a detailed reply to the said show cause notice. Thereafter by a letter dated February 26, 1983, signed by the Chairman-cum-Managing Director of the Corporation, a notice under clause (i) of Rule 9 of the said Rules was given to Ganguly terminating his service with the Corporation with immediate effect. Along with the said letter a cheque for three months' basic pay and dearness allowance was enclosed.

12. So far as Sengupta, the First Respondent in Civil appeal No. 4413 of 1985, is concerned, he was promoted to the post of General Manager (River Services) with effect from January 1, 1980. His name was enrolled by the Bureau of Public Enterprises and he was called for an interview for the post of Chairman-cum-Director of the Corporation by the Public Enterprises Selection Board. According to Sengupta, he could not appear before the Selection Board as he received the letter calling him for the interview after the date fixed in that behalf. According to Sengupta, the new Chairman-cum-Managing Director who was selected at the said interview bore a grudge against him for having competed against him for the said post and on February 1, 1983, he issued a charge-sheet against Sengupta intimating to him that a dis-



disciplinary inquiry was proposed to be held against him under the said Rules and calling upon him to file his written statement of defence. By his letter dated February 10, 1983, addressed to the Chairman-cum-Managing Director, Sen gupta denied the charges made against him and asked for inspection of documents and copies of statements of witnesses mentioned in the said charge-sheet. By a letter dated February 26, 1983, signed by the Chairman-cum-Managing Director notice was given to Seagupta under clause (i) of Rule 9 of the said Rule, terminating his service with the Corporation with immediate effect. Along with the said letter a cheque for three months' basic pay and dearness allowance in lieu of notice was enclosed.

13. Both Ganguly and Sengupta filed writ petitions in the Calcutta High Court under Art 226 of the Constitution challenging the termination of their service as also the validity of the said Rule 9 (i). In both these writ petitions rule nisi was issued and an ex-parte ad interim order staying the operation of the said notice of termination was passed by a learned single Judge of the High Court. The Appellants before us went in Letters Patent Appeal before a Division Bench of the said High Court against the said ad interim orders, the appeal in the case of Ganguly being F.M.A.T. No. 1604 of 1983 and in the case of Sen gupta being F. M. A. T. No. 649 of 1983. On January 28, 1985, the Division Bench ordered in both these Appe-

als that the said writ petitions should stand transferred to and heard by it along with the said appeals. The said appeals and writ petitions were thereupon heard together and by common judgement delivered on August 9, 1985 (reported in 1986 Lab IC 49). The Division Bench held that the Corporation was a State within the meaning of Article 12 of the Constitution and that the said Rule 9 (i) was ultra vires Article 14 of the Constitution. Consequently the Division Bench struck down the said Rule 9 (i) as being void. It also quashed the impugned orders of termination dated February 26, 1983. It is against the said judgement and orders of the Calcutta High Court that the present Appeals by Special Leave have been filed.

14. The contentions raised on behalf of the Corporation at the hearing of these Appeals may be thus summarized :

(1) A Government company stands on a wholly different footing from a statutory corporation for while a statutory corporation is established by statute, a Government company is incorporated like any other company by obtaining a certificate of incorporation under the Companies Act and, therefore, a Government company cannot come within the scope of the term "the State" as defined in Article 12 of the Constitution.

(2) A statutory corporation is usually established in order to create a monopoly in the State in respect of a particular activity. A Government com



s, however, not established for this  
se.

3) The Corporation does not have  
monopoly of inland water transport  
is only a trading company as in  
by the objects clause in its Memo-  
m of Association.

4) Assuming a Government com-  
is "the State" within the meaning  
Article 12, a contract of employment  
entered into by it is like any other con-  
entered into between two parties  
a term in that contract cannot be  
k down under Article 14 of the  
stitution of the ground that it is  
ary or unreasonable or unconscio-  
or one-sided or unfair. At the hear-  
of these Appeals the Union of India,  
is the Second Respondent in these  
als, joined in the contentions raised  
e Corporation.

5. The arguments advanced on  
f of the contesting Respondents in  
d outlines were as follows :

1) The definition of the expression  
"State" given in Article 12 is wide  
gh to include within its scope and  
a Government Company.

2) A State is entitled to carry on  
activity, even a trading activity,  
gh any of its instrumentalities or  
cies, whether such instrumentality or  
ey be one of the Departments of the  
rnment, a statutory corporation, a  
tory authority or a Government  
pany incorporated under the Com-  
es Act.

3) Merely because a Government  
pany carries on a trading activity

or is authorized to carry on a trading  
activity does not mean that it is excluded  
from the definition of the expression "the  
State" contained in Article 12.

(4) A Government company being  
"the State" within the meaning of Arti-  
cle 12 is bound to act fairly and reasona-  
bly and if it does not do so, its action  
can be struck down under Article 14 as  
being arbitrary.

(5) A contract of employment  
stands on a different footing from other  
contracts. A term in a contract of em-  
ployment entered into by a private em-  
ployer which is unfair, unreasonable and  
unconscionable is bad in law. Such a  
term in a contract of employment entered  
into by the State is, therefore, also bad  
in law and can be struck down under  
Article 14.

16. During the course of the hear-  
ing of these Appeals the Central Inland  
Water Transport Corporation Officers'  
Association made an application for per-  
mission to intervene in these Appeals  
and permission to intervene was granted  
to it by this Court. The said Association  
supported the stand taken by the con-  
testing Respondents.

17. We will now examine the cor-  
rectness of the rival submissions advance  
at the Bar.

18. The word "State" has different  
meanings depending upon the context in  
which it is used. In the sense of being  
a polity, it is defined in the Shorter Ox-  
ford English Dictionary, Third Edition,  
Volume II, page 2005, as "a body of  
people occupying a defined territory and



organized under a sovereign government". The same dictionary defines the expression "the State" as "the body politic as organized for supreme civil rule and government; the political organization which is the basis of civil government; hence, the supreme civil power and government vested in a country or nation". According to Black's Law Dictionary, Fifth Edition, page 1262, "In its largest sense, a 'state' is a body politic or a society of men". According to Black, the term "State" may refer "either to the body politic of a nation (ie. g. United States) or to an individual governmental unit of such nation (e. g. California). In modern International practice, whether a community is deemed a State or not depends upon the general recognition accorded to it by the existing group of other States. A State must have a relatively permanent legal organization, determining its structure and the relative powers of its major governing bodies or organs. This legal organizational permanence of a State is to be found in its Constitution. With rare exceptions, such as the United Kingdom, most States now have a written Constitution. The constitutional structure of a State may be either unitary, as when it has a single system of government applicable to all its parts, or federal when it has one system of government operating in certain respects and in certain matters in all its parts and also separate governments operating in other respects in distinct parts of the whole. In such a case the units or sub-divisions having separate governments are variously called

'states' as in India, U. S. A. and Australia, 'provinces' as in Canada, 'cantons' in Switzerland, or designated by other names.

19. Our Constitution is federal in structure, Clause (1) of Article 1 of the Constitution provides that "India, that is Bharat, shall be a Union of States" and clause (2) of that Article provides that "The States and the territories thereof shall be as specified in the First Schedule". The word "States" used in Article 1 thus refers to the federating units of India itself being a State consisting of these units. The term "States" is defined variously in some of the other Articles of the Constitution as the context of the particular Part of the Constitution in which it is used requires. Part VI of the Constitution is headed "The States" and provides for the form of three organs of a State, namely, the Executive, the Legislature and the Judiciary, Article 153 which is the opening Article in Part V of the Constitution, provides as follows:

"152. Definition. —

In this Part, unless the context otherwise requires, the expression 'State' does not include the State of Jammu and Kashmir."

The State of Jammu and Kashmir is excluded because that State, though one of the States which constitute the Union of India, had, in pursuance of the provisions of Article 370 of the Constitution (Application to Jammu and Kashmir) Order, 1954 (C. O. 48), set up a Constituent Assembly for one internal Constitution of the State and it had framed the



stitution of Jammu and Kashmir was adopted and enacted by that Constituent Assembly on November 17, 1956. Article 152 also, therefore, uses the expression "State" as meaning the federating units which constitute the Union of India. Part XIV of the Constitution deals with services under the Union and the States. Article 308 provides as follows:

308. Interpretation.—

In this Part, unless the context otherwise requires, the expression 'State' shall not include the State of Jammu and Kashmir."

This definition read with the other provisions of Part XIV shows that the expression "State" applies to the federating units (other than the State of Jammu and Kashmir for the reason mentioned above) which together constitute the Union of India because in the other provisions of Part XIV wherever the Union of India is referred to, it is described as "the Union". Article 366 of the Constitution defines certain expression used in the Constitution of India. That Article, however, does not contain any definition of the term "State." Under Art 367 unless the context otherwise requires, the General Clauses Act, 1897 (Act No. 10 of 1897, subject to any adaptations and modifications that may be made therein by the President of India) or Article 372 to bring that Act in accord with the provisions of the Constitution, applies for the interpretation of the Constitution, Clause (58) of Article 3 of the General Clauses Act

defines the term "State" as follows :

"(58) 'State'.

(a) as respects any period before the commencement of the Constitution (Seventh Amendment) Act, 1956, shall mean a Part A State, a Part B State or a Part C State and

(b) as respects any period after such commencement, shall mean a State specified in the First Schedule to the Constitution and shall include a Union territory.

This definition, therefore, also confines the term "State" to the federating units which together form the Union of India.

20. We are concerned in these Appeals with Article 12. Article 12 forms part of Part III of the Constitution which deals with Fundamental Rights and provides as follows:

"12. Definition—

In this Part, unless the context otherwise requires, 'the State' includes the Government and Parliament of India and the Government and the Legislature of each of the State and all local or other authorities within the territory of India or under the control of the Government of India" (Emphasis supplied). The same definition applies to the expression "the State" when used in Part IV of the Constitution which provides for the Directive Principles of State Policy, for the opening Article of Part IV, namely, Article 36, provides :

"36. Definition—

In this Part, unless the context



otherwise requires, 'the State' has the same meaning as in Part III."

the expression "local authority" is defined in clause (31) of section 3 of the General Clauses Act as follows:

"(31) 'Local authority' shall mean a municipal committee, district Board, body of port commissioners or other authority legally entitled to, or entrusted by the Government with, the control or management of a municipal or local fund."

21. Thus, the expression "the State" when used in Parts III and IV of the Constitution is not confined to only the federating States or the Union of India or even to both. By the express terms of Article 12 the expression "the State" includes—

- (1) the Government of India,
- (2) Parliament of India,
- (3) the Government of each of the States which constitute the Union of India,
- (4) the Legislature of each of the States which constitute the Union of India,
- (5) all local authorities within the territory of India,
- (6) all local authorities under the control of the Government of India,
- (7) all other authorities within the territory of India, and
- (8) all other authorities under the control of the Government of India.

22. There are three aspects of Art. 12 which require to be particularly noti-

ced. These aspects are :

(i) the definition given in Art. 12 is not an explanatory and restrictive definition but an extensive definition.

(ii) it is the definition of the expression "the State" and not of the terms "State" or "States", and

(iii) it is inserted in the Constitution for the purposes of Parts III and IV thereof.

23. As pointed out in Craies on Statute Law, Seventh Edition, page 21 where an interpretation clause defines a word to mean a particular thing, the definition is explanatory and prima facie restrictive; and whenever an interpretation clause defines a term to include something, the definition is extensive. While an explanatory and restrictive definition confines the meaning of the word defined to what is stated in the interpretation clause, so that wherever the word defined is used in the particular statute in which that interpretation clause occurs, it will bear only that meaning unless where, as is usually provided, the subject or context otherwise, an extensive definition expands or extends the meaning of the word defined to include within it what would otherwise not have been comprehended in it when the word defined is used in its ordinary sense. Article 12 uses the word "includes". It thus extends the meaning of the expression "the State" so as to include within it also what otherwise may not have been comprehended by that expression when used in its ordinary legal sense.

24. Article 12 defines the expression



the State" while the other Articles of the Constitution referred to above, Article 152 and Article 308, and (58) of Section 3 of the General Clauses Act define the term "State". The deliberate use of the expression "the State" in Art. 12 as also in Art. 13 would have normally shown that this expression was used to denote the State in its ordinary and Constitutional sense. The concept of an independent or sovereign State is the inclusive clause in Art. 12. It would have extended this meaning to include within its scope whatever has been expressly set out in Art. 12. The definition of the expression "the State" in Art. 12 is, however, for the purposes of Parts III and IV of the Constitution. The contents of these two Parts clearly show that the expression "the State" in Art. 12 as also in Art. 36 is not confined to its ordinary and Constitutional sense as extended by the inclusive portion of Art. 12 but is used in the concept of the State in relation to the Fundamental Rights guaranteed by Part III of the Constitution and the Directive Principles of State Policy contained in Part IV of the Constitution. These Principles are declared by Art. 32 to be fundamental to the governance of the country and enjoins upon the courts to apply in making laws.

25. What then does the expression "the State" in the context of Parts III and IV of the Constitution mean?

26. Men's concept of the State as a political unit or entity and the functions of the State are bound to have changed over the

years and particularly in the course of this century. A man cannot obstinately cling to the same ideas and concepts all his life. As Emerson said in his essay on "Self-Reliance". "A foolish consistency is the hobgoblin of little minds". Man is by nature ever restless, ever discontent, ever seeking something new, ever dissatisfied with what he has. This inherent trait in the nature of man is reflected in the society in which he lives for a society is a conglomerate of men who live in it. Just as man by nature is dissatisfied, so is society. Just as man seeks something new, ever hoping that a change will bring about something better, so does society. Old values, old ideologies and old systems are thus replaced by new ideologies, a new set of values and a new system; they in their turn to be replaced by different ideologies different values and a different system. The ideas that seem revolutionary become outmoded with the passage of time and the heresies of today become the dogmas of tomorrow. What proves to be adequate and suited to the needs of a society at a given time and in particular circumstances turns out to be wholly unsuited and inadequate in different times and under different times and under different circumstances.

27. The story of mankind is punctuated by progress and retrogression. Empires have risen and crashed into the dust of history. Civilizations have flourished, reached their peak and passed away. In the year 1625, Carew, C. J., while delivering the opinion of



the House of Lords in *Re the Earldom of Oxford*, (1625) W. Jo 96, 101 SC (1626) 82 ER 50.53 in a dispute relating to the descent of that Earldom, said:

“and yet time hath his revolution, there must be a period and an end of all temporal things, finis retum, an end of names and dignities, and whatsoever is terrene.”

The cycle of change and experiment, rise and fall, growth and decay, and of progress and retrogression recurs endlessly in the history of man and the history of civilization. T. S. Eliot in the First Chorus from “The Rock” said:

“O. perpetual revolution of configured stars,

O. perpetual recurrence of determined seasons,

O. world of spring and autumn, birth and dying;

The endless cycle of idea and action,  
Endless invention, endless experiment”.

18. The law exists to serve the needs of the society which is governed by it. If the law is to play its allotted role of serving the needs of the society, it must reflect the ideas and ideologies of that society. It must keep time with the heart beats of the society and with the needs and aspirations of the people. As the society changes, the law cannot remain immutable, the early nineteenth century essayist and wit, Sydney Smit, said, “When I hear any man talk of an unalterable law, I am convinced that he is an unalterable fool.” The law must,

therefore, in a changing society march in tune with the changed ideas and ideologies. Legislatures are, however, not best fitted for the role of adapting the law to the necessities of the time for the legislative process is too slow and the legislatures often divided by politics, slowed down by periodic elections and overburdened with myriad other legislative activities. A constitutional document is even less suited to this task for the philosophy and the ideology underlying it must of necessity be expressed in broad and general terms and the process of amending a Constitution is too cumbersome and consuming to meet the immediate needs. This task must, therefore, of necessity fall upon the courts because the courts can by the process of Judicial interpretation adapt the law to suit the needs of the society.

29. A large number of authorities were cited before us to show how the courts have interpreted the expression “the State” in Article 12. As these authorities are decisions of this Court we must perforce go through the whole gamut of them though we may preface an examination of these authorities with the observation that they only serve to show how the concepts of this Court have changed both with respect to Article 12 and Article 14 to keep pace with changing ideas and altered circumstances. Before embarking upon this task we would, task we would, however, like, to quote the following passage (which has become a classic) from the opening paragraph of Justice Oliver Wendell Holmes’s. The



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non Law" which contains, the lec-  
 delivered by him while teaching  
 Harvard and which book was  
 shed in 1881 just one year before  
 s appointed an Associate Justice  
 e Massachusetts Supreme Judicial  
 :

It is something to show that the  
 stency of a system requires a parti-  
 result, but it is not all. The life  
 has not been logic : it has been  
 fence. The felt necessities of the  
 the prevalent moral and political  
 es, intuitions of public policy,  
 ed or unconscious, exen the preju-  
 which judges share with their  
 men, have had a good deal more  
 than the syllogism in determining  
 les by which men should be gover-  
 The law embodies the story of a  
 n's development through many  
 ries, and it cannot be dealt with  
 it contained only the exioms and  
 laries of a book of mathematics.  
 der to know what it is, we must  
 what it has been, and what it  
 to become. We must alternately  
 ult history and existing theories  
 gislation. But the most difficult  
 r will be to understand the combi-  
 n of the two into new products at  
 stage. The substance of the law at  
 iven time pretty nearly corres-  
 s, so far as it goes, with what is  
 understood to be convenient; but  
 rm and machinery, and the degree  
 ich it is able to work out desired  
 s, depend very much upon its

30. We will, therefore, briefly

sketch the temper of the time in which  
 out Constitution was enacted and the  
 purposes for Which Parts III and IV were  
 inserted in our Constitution.

31. The bombs which had rained  
 down upon the cities of Europe, Africa  
 and Asia and the Islands in the Pacific  
 had changed, and changed dramatically,  
 not only the political but also the socio-  
 logical, ideological and economic map  
 of the world. A world reeling from the  
 horrors of the Second World War and  
 seeking to recover from the trauma  
 caused by its atrocities sought to band  
 all nations into one Family of Man and  
 for this purpose set up the United  
 Nations Organization in order to save  
 succeeding generations from the scourge  
 of war which had twice in this century  
 brought untold sorrow to mankind and  
 in order to reaffirm faith in fundamental  
 human rights, in the dignity and worth  
 of the human person and in the equal  
 rights of man and woman and of nations  
 large or small, and thus to give concrete  
 shape to the dream of philosophers and  
 poets that the war-drums would throb  
 no longer and the battle-banners would  
 be furled in the parliament of Man and  
 the Federation of the world. But much  
 had gone before. There was the signing  
 of the Inter-Allied Declaration of June  
 12, 1941, at S. James's Palace in London  
 by the representatives of the United  
 Kingdom, the Common-wealth, General  
 de Gaulle and the governments in exile  
 of the European countries conquered by  
 Nazi Cermany; there was the Atlantic  
 Charter of August 14, 1941 ; there was  
 the declation of the United Nations



signed on New Year's Day of 1942 at Washington, D.C., by twenty six nations who were fighting the Axis; there was the Declaration made at the Moscow Conference in October 1943 and at the Teheran Conference of December 1, 1943; there was the Dumbarton Oaks Conference held in Washington, D. C., in August and September 1944; there was the Yalta Conference in February 1945; all these culminating in the adoption on June 25, 1945, of the Charter of the United Nations in the Opera House of San Francisco and the affixing of signatures thereon the next day in the auditorium of the Veterans' Memorial Hall. Thereafter, in pursuance of Article 68 of the Charter of the United States, the Economic and Social Council set up the Human Rights Commission in 1946. This Commission began its work in January 1947 under the chairmanship of Mrs. Eleanor Roosevelt, the widow of President Franklin D. Roosevelt. The Universal Declaration of Human Rights prepared by the Commission was adopted by the General Assembly on December 10, 1948, at its session held in the Palais de Chaillot in Paris. Of the fifty-eight nations represented at that Session, none voted against it, two were absent, and eight abstained from voting.

32. It was thus in an atmosphere surcharged with human suffering and yet a firm resolve not to succumb to it that the Constituent Assembly which was set up to frame the Constitution of India embarked upon its task on December 9, 1946, re-assembled after the midnight of August 14, 1947, as the sover-

eign Constituent Assembly for India. After partition and fresh election in the new provinces of West Bengal and East Punjab, it re-assembled on October 3, 1947, and thereafter on November 2, 1949, adopted and enacted the Constitution of India.

33. Before commencing its work the Constituent Assembly adopted a Resolution leaving down its objectives :

"1. This Constituent Assembly declares its firm and solemn resolve to proclaim India as an Independent Sovereign Republic and to draw up for her future governance a constitution;.....

4. Wherein all power and authority of Sovereign Independent India, its constituent parts and organs of government, are derived from the people ; and

5. Wherein shall be guaranteed and secured to all the people of India justice, social, economic and political : equality of status, of opportunity, and before the law; freedom of thought, expression, belief, faith, worship, vocation, association, and action, subject to law and public morality; and

6. Wherein adequate safeguards shall be provided for minorities, backward and tribal areas, and depressed and other backward classes; and

7. Whereby shall be maintained the integrity of the territory of the Republic and its sovereign rights on land, sea, and air according to justice and the law of civilised nations; and

8. This ancient land attains its rightful and honoured place in the world



**D. P. Madon**  
**Judge**  
**Supreme Court of India**

kes its full and willing contribution to the promotion of world peace and the welfare of mankind”.

In its strict legal sense the Constitution of a country is a document which defines the regular system of its government, contains the rules that directly or indirectly govern the distribution or exercise of sovereign power of the State and it is mainly concerned with the creation of the three organs of the State, the executive, the legislature and the judiciary, and the distribution of governmental power among them and the definition of their mutual relation (see *Prashad Singh Deo v. Union of India*, 1952 SCR 89, 106 : (AIR SC 1952 89, 106). O. Hood Phillips’ “Constitutional and Administrative Law.” Sixth Edition, 1957; Dicey’s “An Introduction to the Study of the Law of the Constitution.” 10th Edition, and Jowitt’s Dictionary of English Law, Second Edition, Vol. 1, 1957).

The framers of our Constitution did not, however, want to frame a Sovereign Democratic Republic which was to emerge from their labours in the strict legal sense. They were aware that there were other constitutions which had given expression to certain ideals as the goal to which the Country should strive and which had defined the principles regarded as fundamental to the government of the country. They were aware of the events that had culminated in the Charter of the United Nations.

They were aware that the Universal Declaration of Human Rights had been adopted by the General Assembly of the United Nations, for India was a signatory to it. They were aware that the Universal Declaration of Human Rights contained certain basic and fundamental rights appertaining to all men. They were aware that these rights were born of the philosophical speculations of the Greek and Roman Stoics and nurtured by the jurists of ancient Rome. They were aware that these rights had found expression in a limited form in the accords entered into between the rulers and their powerful nobles, as for instance, the accord of 1188 entered into between King Alfonso IX and the Cortes of Leon, the Magna Carta of 1215 wrested from King John of England by his barons on the Meadow of Runnymede and to which he was compelled to affix his Great Seal on a small island in the Thames in Buckinghamshire—still called Magna Carta Island, and the guarantees which King Andrew II of Hungary was forced to give by his Golden Bull of 1222. They were aware of the international treaties of the mid-seventeenth century for safeguarding the right of religious freedom and the rights of aliens. They were aware of the full blossoming of the concept of Human Rights in the writings of the “philosophes” such as Voltaire, Rousseau, Diderot, Raynal, d’Alibert and others, and of the concrete expression given to it in the various Declarations of Rights of the American Colonies (particularly Virginia) and in the American Decla-



ration of Independence. They were aware that in 1789, during the early years of the French Revolution, the French National Assembly had in "The Declaration of the Rights of Man and of the Citizen" proclaimed these rights in lofty words and that Revolutionary France had translated them into practice with bloody deeds. They were aware of the treaties entered into between various States in the nineteenth century providing protection for religious and other minorities. They were aware that these rights had at last found universal recognition in the Universal Declaration of Human Rights. They were aware that the first ten Amendments to the Constitution of the United States of America contained certain rights akin to Human Rights. They knew that the Constitution of Eire contained a chapter headed "Fundamental Rights" and another headed "Directive Principles of State policy". They were aware that the Constitution of Japan also contained a chapter headed "Rights and Duties of the people." They were aware that the major traditional functions of the State have been the defence of its territory and its inhabitants against external aggression, the maintenance of law and order, the administration of justice, the levying of taxes and the collection of revenue. They were also aware that increasingly, and particularly in modern times, several States have assumed numerous and wide-ranging functions, especially in the fields of education, health, social security, control and maintenance of natural resources and

natural assets, transport and communication services, and operation of certain industries communication services, operation of certain industries considered basic to the economy and growth of the nation. They were also aware of Section 8 of Article 1 of the Constitution of the United States of America contained "a welfare clause" empowering the federal government to enact laws for the overall general welfare of the people. They were aware that countries such as the United States, the United Kingdom and Germany had passed social welfare legislation.

36. The framers of our Constitution were men of vision and ideals, many of them had suffered in the cause of freedom. They wanted on idealistic and philosophic base upon which to raise the administrative superstructure of the Constitution. They, therefore, headed our Constitution with a preamble which declared India's goal and inserted Parts III and IV in the Constitution.

37. The Preamble to the Constitution, as amended by the Constitution (Forty-second Amendment) Act, 1971 proudly proclaims :

"WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIAL SECULAR DEMOCRATIC REPUBLIC and to Secure to all its citizens :

JUSTICE, social, economic and political ;

LIBERTY of thought, expression, belief, faith and worship ;

EQUALITY of Status and of opp



**D. P. Madon**  
**Judge**  
**Supreme Court of India**

y; and to promote among them

FRATERNITY assuring the dignity  
 e individual and the unity and inte-  
 of the Nation;

IN OUR CONSTITUENT ASSEM-  
 this twentysixth day of November,  
 , do HEREBY ADOPT, ENACT  
 O GIVE TO OURSELVES THIS  
 NSTITUTION.;

38. Part III of the Constitution gives  
 constitutional mandate for certain Hu-  
 Rights-called Fundamental Rights in  
 Constitution-adapted to the needs  
 requirement of a country only rece-  
 freed from foreign rule and desirous  
 orging a powerful nation capable of  
 ng an equal place among the nations  
 e world. It also provides a Constitu-  
 al mode of enforcing them Amongst  
 e Rights is the one contained in Arti-  
 14 which provides :

“14. Equality before law-

The State shall not deny to any per-  
 equality before the law or the equal  
 ection of the laws within the territory  
 ndia.”

39. Part IV of the Constitution pres-  
 s the Directive Principles of State  
 cy. These Directive Principles have  
 received the same Constitutional man-  
 for their enforcement as the Fun-  
 damental Rights have done. In the con-  
 of the Welfare State which is the goal  
 ur Constitution, Articles 37 and 38  
 re important. They are as fol-

:

“37. Application of the Principles  
 contained in this Part—

The provisions contained in this Part  
 shall not be enforceable by any Court, but  
 the principles therein laid down are never-  
 theless fundamental in the governance of  
 the country and it shall be the duty of the  
 state to apply these principles in making  
 laws.’,

“38. (1) State to secure a social or-  
 der for the promotion of welfare of the  
 people—

(1) The State shall strive to pro-  
 mote the welfare of the people by secu-  
 ring and protecting as effectively as it  
 may a social order in which justice, So-  
 cial economic and political, shall inform  
 all the institutions of the national life.”  
 Under Clause (a) of Article 39, the  
 State is, in particular, to direct its policy  
 towards securing that the citizens, men  
 and women equally, have the right to  
 an adequate means of livelihood. Arti-  
 cle 41 directs that the State shall,  
 within the limits of its economic capa-  
 city and development, make effec-  
 tive provision for securing the right to  
 work.

40. The difference between Part III  
 and Part IV is that while Part III prohi-  
 bits the State from doing certain things  
 (namely, from infringing any of the Fun-  
 damental Rights), Part IV enjoins upon  
 the State to do certain things. This  
 duty, however, is not enforceable in  
 law but nonetheless the Court cannot  
 ignore what has been enjoined upon the  
 State by Part IV, and though the Court  
 may not be able actively to enforce



the Directive Principles of State Policy by compelling the State to apply them in the governance of the country or in the making of laws the Court can, if the State commits a breach of its duty by acting contrary to these Directive Principles, prevent it from doing so.

41. In the working of the Constitution it was found that some of the provisions of the Constitution were not adequate for the needs of the country or for ushering in a Welfare State and the constituent body empowered in that behalf amended the Constitution several times. By the very first amendment made in the Constitution, namely, by the Constitution (First Amendment Act, 1951, Clause (6) of Article 9 was amended with retrospective effect. Under this amendment, sub-clause (g) of Clause (1) Article 19 which guarantees to all citizens the right to carry on any occupation, trade or business, was not to prevent the State from making any law relating to the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise. This amendment also validated the operation of all existing laws in so far as they had made similar provisions. Article 298, as originally enacted, provided that the executive power of the Union and of each State was to extend, subject to any law made by the appropriate Legislature, to the grant, sale, disposition or mortgage of any property held for

the purposes of the Union or of such State, as the case may be, and to the purchase or acquisition of property for those purposes respectively, and to the making of contracts ; and it further provided that all property acquired for the purposes of the Union or of a State was to vest in the Union or in such State, as the case may be. Article 298 was substituted by the Constitution (Seventh Amendment) Act, 1956. — As substituted, it provides as follows :

“298 Power to carry trade, etc.—

The executive power of the Union and each State shall extend to the carrying on of any trade or business and to the acquisition, holding and disposal of property and the making of contracts for any purpose :

Provided that-

(a) the said executive power of the Union shall, in so far as such trade or business or such purpose is not one with respect to which Parliament may make laws, be subject in each State to legislation by the State ; and

(b) the said executive power of each State shall, in so far as such trade or business or such purpose is not one with respect to which the State Legislature may make laws, be subject to legislation by Parliament.”

Article 298, as so substituted, therefore, expands the executive power of the Union of India and of each of the States which collectively constitute the Union to carry on any trade or business. By extending the executive power of the



and of each of the States to carrying on of any trade or business. Article 298 does, not, however, limit either the Union of India or any of the States which collectively form the Union into a merchant buying and selling goods or carrying on either trade or business activity, for the exercise of power of the Union and of the States, whether in the field of trade or commerce or in any other field, is always subject to Constitutional limitations and particularly the provisions relating to Fundamental Rights in Part III of the Constitution and is exercisable in accordance with and for the enforcement of the Directive Principles and the Policy prescribed by Part IV of the Constitution.

2. The State is an abstract entity and it can, therefore, only act through its agencies or instrumentalities, whether such agency or instrumentality be human or juristic. The trading and business activities of the State constitute "public enterprise". The various forms in which the Government operates in the field of public enterprise are many and varied. These may consist of Government departments, statutory bodies, statutory corporations, Government companies, etc. In this context, we can do no better than cite the following passage from *Government Enterprise A Comparative Study* by W. Friedmann and J. F. Gar-

proceeded to establish public enterprises is almost infinite, but three main types emerge to which almost every public enterprise approximates : (1) departmental administration; (2) the joint stock company controlled completely or partly by public authority ; and finally (3) the public corporation proper, as a distinct type of corporation different from the private law company. Each of these three types will be briefly analysed in a comparative perspective.

As the tasks of Government multiplied, as a result of defence needs, post war crises, economic depressions and new social demands, the framework of civil service administration became increasingly insufficient for the handling of the new tasks which were often of a specialised and highly technical character. At the same, time, 'bureaucracy triumphant.' In France the Confédération General du Travail (GGT) had stated in its programme in 1920 that 'we do not wish to increase the functions of the State itself nor strengthen a system which would subject the basic industry to a civil service regime, with all its lack of responsibility and its basic defects, a process which would subject the forces of production to a fiscal monopoly. "This distrust of government by civil service, justified or not, was a powerful factor in the development of a policy of public administration through separate corporation which would operate largely according to business principles and be separately accountable. In the common law countries, where the Government still enjoys considerable immunities and

'The variety of forms in which the various States have, at different times,



privileges in the fields of legal responsibility, taxation, or the binding force of Statutes, other considerations played their part. It seemed necessary to create bodies which if they were to compete on fair terms in the economic field, had to be separated and distinct from the Government as regards immunities and privileges."

43. The immunities and privileges possessed by bodies so set up by the Government in India cannot, however, be the same as those possessed by similar bodies established in the private sector because the setting up of such bodies is referable to the executive power of the Government under Article 298 to carry on any trade or business. As pointed out by Mathew, J., in *Sukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi* (1975) 3 SCR 619 : (AIR 1975 SC 1331 "The governing power wherever located must be subject to the fundamental constitutional limitations." The privileges and immunities of these bodies, therefore, are, subject to Fundamental Rights and exercisable in accordance with and in furtherance of the Directive Principles of State Policy.

44. It is in the context of what has been stated above that we will now review the authorities cited at the Bar. When we consider these authorities, we will see how as Constitutional thinking developed and the conceptual horizon widened, new vistas, till then shrouded in the mist of conventional legal phraseology and traditional orthodoxy

opened out to the eye of judicial interpretation, and many different facets of several Articles of the Constitution including Arts 12 and 14, hitherto unperceived, become visible. There are, however, still remain vistas yet to be opened up, veils beyond which we today cannot see to be lifted, and doors to which we still have found no key to be unlocked.

45. In *Ram Jawaya Kapur v. State of Punjab* (1955) 2 SCR 225 : (AIR 1955 SC 549) the State of Punjab, which used to select books published by private publishers for prescribing them as text-books and for this purpose used to invite offers from publishers and authors, altered that practice and amended the notification in that behalf so that thereafter only authors were asked to submit their books for approval as text-books. The validity of this notification was challenged inter alia on the ground that the executive power of a State under Article 162 extended only to executing the laws passed by the legislature or supervising the enforcement of such laws. Under Article 162, subject to the provisions of the Constitution, the executive power of a State extends to the matters with respect to which the legislatures of the State has power to make laws, namely, the matters enumerated in the State List (List II) in the seventh Schedule to the Constitution. Under the proviso to that Article, in any matter with respect to which the Legislature of a State and Parliament have power to make laws, that is, the matters enumerated in the Concurrent List (List



the Seventh Schedule to the Constitution, the executive power of the State is to be subject to, and limited by, the executive power expressly conferred by the Constitution or by any law made by Parliament upon the Union or any State or territories thereof. Under Article 154 the executive power of the State is vested in the Governor and is to be exercised by him either directly or through officers subordinate to him in accordance with the Constitution. The corresponding provisions as regards the executive power of the Union of India are contained in Article 73 and Article 75.

Repelling the above contention, Justice, C. J., who spoke for the Constitution Bench of the Court observed (SCR) :

"A modern State is certainly expected to engage in all activities necessary for the promotion of the social and economic welfare of the community."

The following passage (at page 325 of SCR) : (at Pp. 555-56 of AIR) is the judgement of the Court in the case with respect to the meaning of the expression "executive function" is authoritative and requires to be reproduced.

It may not be possible to frame an authoritative definition of what executive function means and implies. Ordinarily executive power connotes the residue of governmental functions that remain after legislative and judicial functions have been taken away. The Indian Constitution has not indeed recognised the doctrine of separation of powers in its absolute

form but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate accumulation, by one organ or part of the State, of functions that essentially belong to another. The executive indeed can exercise the powers of departmental or subordinate legislation when such powers are delegated to it by the legislature. It can also, when so empowered, exercise judicial functions in a limited way. The executive Government, however, can never go against the provisions of the Constitution or of any law. This is clear from the provisions of Article 154 of the Constitution but, as we have already stated, it does not follow from this that in order to enable the executive to function there must be a law already in existence and that the powers of the executive are limited merely to the carrying out of these laws."

(Emphasis supplied)

46. In *Rajasthan State Electricity Board, Jaipur v. Mohan Lal*, (1967) 3 SCR 377 : (AIR 1967 SC 1857) a Constitution Bench of this Court by a majority held that the Electricity Board of Rajasthan constituted under the Electricity (Supply) Act, 1948 (Act No. 54 of 1948) was "the State" as defined in Article 12 because it was "other authority" within the meaning of that Article. The Court held that the expression "other authority" was wide enough to include within it every authority created by a statute, on which powers are conferred to carry out governmental or quasi-



governmental functions and functioning within the territory of India or under the Control of the Government of India and the fact that some of the powers conferred may be for the purpose of carrying on Commercial activities is not at all material because under Articles 19 (1) (g) and 298 even the State is empowered to carry on any trade or business. The Court further held that in interpreting the expression "other authority" the principle of ejusdem generis should not be applied, because, for the application of that rule, there must be distinct genus or category running through the bodies previously named; and the bodies specially named in Article 12 being the Executive Government of the Union and the States and local authorities, there is no common genus running through these named bodies, nor could these bodies be placed in one single category on any rational basis.

47. *Prage Tools Corporation V. C. V. Imanuel*, (1969) 3 SCR 773: (AIR 1969 SC 1306) was a case heavily relied upon by the Appellants. *Praga Tools Corporation* was a company incorporated under the Companies Act, 1913, and therefore, a company within the meaning of the Companies Act, 1956. At the material time the Union of India held fifty six per cent of the shares of the Company and the Government of Andhra Pradesh held thirty-two per cent of its shares, the balance of twelve per cent shares being held by private individuals. As being the largest shareholder, the Union of India had the power to no-

minate the Company's directors. The company had entered into two settlements with its workmen's union. These settlements were arrived at and recorded in the presence of the Commissioner of Labour. Subsequently, the company entered into another agreement with the union, the effect of which was to enable the company, notwithstanding the earlier two settlements, to retrench ninety-two of its workmen. Some of the affected workmen thereupon filed a writ petition under Art. 226 of the Constitution in the Andhra Pradesh High Court challenging the validity of the subsequent agreement. A learned Single Judge of the High Court dismissed the petition on merits. In appeal, a Division Bench of that Court held that the Company being registered under the Companies Act, 1913, not having any statutory duty or function to perform was not one against which a writ for mandamus or any other writ could lie. The Division Bench, however, held that though the writ petition was not maintainable the High Court could grant a declaration in favour of the petitioners that the impugned agreement was illegal and void and granted the said declaration. In appeal by the company, a two Judge Bench of the Supreme Court held that the Company being a non-statutory body and one incorporated under the Companies Act, 1913, there was neither a statutory nor a public duty imposed on it by a statute in respect of which enforcement could be sought by means of a mandamus. So far as the declaration given by the Division Bench of the High Court was concerned,



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court, held (at page 780) (of SCR) : (at 1310 of AIR) :

“In our view once the writ petition was held to be misconceived on the ground that it could not lie against a company which was neither a statutory company nor one having public duties or responsibilities imposed on it by a statute, no relief by way of a declaration as to invalidity of an impugned agreement between it and its employees could be granted. The High Court in these circumstances ought to have left the workmen to resort to the remedy available to them under the Industrial Disputes Act by raising an industrial dispute thereunder.”

Though this case was strongly relied upon by the Appellants, we fail to see how it is relevant to the submissions advanced by the Appellants. The subsequent agreement enabling the company to retrench some of its workmen was challenged on the ground that it was in breach of the earlier settlements entered into between the company and the workmen's union. No question of violation of any of the Fundamental Rights was at all raised in that case. The only question which fell for determination was whether a writ of mandamus can issue to compel the performance of the earlier settlements or to restrain the enforcement of the impugned subsequent agreement and the dispute, therefore, was one which fell within the scope of the Industrial Disputes Act, 1947 (Act No. 14 of 1947).

48. In *State of Bihar v. Union of*

*India* (1970) 2 SCR 522 : (AIR 1970 SC 1446), the State of Bihar filed nine suits under Article 131 in connection with the delayed delivery of iron and steel materials for the construction work of the Gandak project. In all these suits the first defendant was the Union of India while the second defendant in six of these suits was the Hindustan Steel Ltd. and in the remaining three, the Indian Iron and Steel Company Ltd. This Court held that the specification of the parties in Article 131 was not of an extensive kind and excluded the idea of a private citizen, a firm or a corporation figuring as a disputant either alone or even along with a State or the Government of India in the category of a party to the dispute under Art. 131. The Court further held that the enlarged definition of the expression “the State” given in Parts III and IV of the Constitution did not apply to Art. 131 and, therefore, a body like the Hindustan Steel Ltd. could not be considered as “a State” for the purpose of Art. 131. We fail to see in what way this decision is at all relevant to the point. The question before the Court in that case was whether the Hindustan Steel Ltd. or the Indian Iron and Steel Company Ltd. was a State to enable a suit to be filed against it under Art. 131 and not whether either of these companies fell within the scope of the definition of the expression “the State” in Art. 12.

49. Another authority relied upon by the appellants was *S. L. Agarwal v. General Manager, Hindustan Steel Ltd.*



(1970) 3 SCR 363 : (AIR 1970 SC 1150). The facts of that case and the contentions raised thereunder show that this authority is equally irrelevant. In that case an employee of the Hindustan Steel Ltd., whose services were terminated, filed a petition under Art. 226 claiming that such termination was wrongful as it was really by way of punishment as the provisions of Art. 311 (2) of the Constitution had not been complied with. This Court held that the protection of Cl. (2) of Art. 311 was available only to the categories of persons mentioned in that clause and that though the appellant held a civil post as opposed to a military post, it was not a civil post under the Union or a State and, therefore, he could not claim the protection of Art. 311 (2). The contention which was raised on behalf of the appellant was that as Hindustan Steel Ltd. was entirely financed by the Government and its management, the post was virtually under the Government of India. This contention was rejected by the Court holding that the company had its independent existence and by law relating to corporations it was distinct from its members and, therefore, it was not a department of the Government nor were its employees servants holding posts under the Union. No question arose in that case whether the company was "the State" within the meaning of Art. 311 (2) and all that was sought to be contended was that it was a department of the Government.

50. In *Sabhajit Tewary v. Union of India* (1975) 3 SCR 616 : (AIR 1975

SC 1329) this Court held that the Council of Scientific and Industrial Research, which was a society registered under the Societies Registration Act, was not an authority within the meaning of Art. 311 (2) and, therefore, certain letters written by it to the petitioner with respect to his remuneration could not be challenged as being discriminatory and violative of Art. 14. The contention raised in that case was that the rules governing the said Council showed that it was really an agent of the Government. This Court rejected the said contention in these words (at page 617) (SCR).

"This contention is unsound. The Council of Scientific and Industrial Research Society does not have a statutory character like the Oil and Natural Gas Commission, or the Life Insurance Corporation or Industrial Finance Corporation. It is a society incorporated in accordance with the provisions of the Societies Registration Act. The fact that the Prime Minister is the President or that the Government appoints nominees to the Governing Body or that the Government may terminate the membership will not establish anything more than the fact that the Government takes special care that the promotion guidance and co-operation of scientific and industrial research, the institution and financing of specific researches, establishment and development and assistance to special institutions or departments of the existing institutions for scientific study or problems affecting particular industry in a trade, the utilisation of the result of the research



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ducted under the auspices of the Council towards the development of industries in the country are carried out in a responsible manner."

51. We now come to a case of considerable importance, namely, *Sukh Singh v. Bhagatram Sardar Singh Bhuvanshi* (1975 (3) SCR 619 : AIR 1975 SC 1331). Two questions fell to be determined in this case, namely, (i) whether statutory corporations are comprehended within the expression "the State" as defined in Art. 12 and (ii) whether the regulations framed by a statutory corporation in exercise of power conferred by the statute creating the corporation have the force of law. The majority of a Constitution Bench of this Court answered both these questions in the affirmative. The statutory corporations before the Court in that case were the Oil and Natural Gas Commission established under the Oil and Natural Gas Commission Act, 1956, the Life Insurance Corporation established under the Life Insurance Corporation Act, 1956, and the Industrial Finance Corporation established under the Industrial Finance Corporation Act, 1984. Ray, C. J., speaking for himself and Chandrachud and Gupta, J., pointed out (at page 634) (of SCR) : Pp. 1341-42 of AIR) that "The State undertakes commercial functions in combination with Government functions in a welfare State." The majority held that "the State" as defined in Art. 12 comprehends bodies created for the purpose of promoting economic interests of the people and the circumstance that

statutory bodies are required to carry on some activities of the nature of trade or commerce does not indicate that they must be excluded from the scope of the expression "the State", for a public authority is a body which has public or statutory duties to perform and which performs those duties and carries on its transactions for the benefit of the public and not for private profit and by that fact such an authority is not excluded from making a profit for the public benefit. Mathew, J., in his concurring judgement held that a finding of State financial support plus an unusual degree of control over the management and policies might lead one to characterize an operation as State action. The learned Judge observed (at pages 651-52) (of SCR) :

"Institutions engaged in matters of high public interest or performing public functions are by virtue of the nature of the function performed government agencies. Activities which are too fundamental to the society are by definition too important not to be considered government function. This demands the delineation of a theory which requires government to provide all persons with all fundamentals of life and the determinations of aspects which are fundamental. The State today has an affirmative duty of seeing that all essentials of life are made available to all persons. The task of the State today is to make possible the achievement of a Good life both by removing obstacles in the path of such achievement and in assisting individual in realizing his ideal of self-



perfection Assuming that indispensable functions are government functions, the problem remains of defining the line between fundamentals and non fundamentals. The analogy of the doctrine of 'business affected with a public interest' immediately comes to mind."

After referring to the relevant provisions of the Acts under which the above statutory bodies were established, Mathew, J., continued (at pages 654-5) (of SCR) :

"The fact that these corporations have independent personalities in the eye of law does not mean that they are not subject to the control of government or that they are not instrumentalities of the government. These corporations are instrumentalities or agencies of the State for carrying on businesses which otherwise would have been run by the State departmentally. If the State had chosen to carry on these businesses through the medium of government departments, there would have been no question that actions of these departments would be 'State actions'. Why then should actions of these corporations be not State actions ?.....

The ultimate question which is relevant for our purpose is whether such a corporation is an agency or instrumentality of the government for carrying on a business for the benefit of the public. In other words, the question is, for whose benefit was the corporation carrying on the business? When it is seen from the provisions of that on liquidation of the Corporation, its assets should be divided among the

shareholders, namely, the Central State Governments and others, if the implication is clear that the benefit of the accumulated income would go to the Central and State Governments. Nobody will deny that an agent has a legal personality different from that of the principal. The fact that the agent is subject to the direction of the principal does not mean that he has no legal personality of his own. Likewise, merely because a corporation has legal personality of own, it does not follow that a corporation cannot be an agent or instrumentality of the State, if it is subject to control of government in all important matters of policy. No doubt, there might be some distinction between the nature, of control exercised by principal over agent and the control exercised by government over public corporation. That, I think is only a distinction in degree. The crux of the matter is that a public corporation is a new type of institution which has sprung from the social and economic functions of government and that it therefore does not neatly fit into old legal categories. Instead of forcing it into them, the law should be adapted to the needs of changing times and conditions".

(Emphasis supplied)

52. Various aspects of the question which we have to decide were exhaustively considered by this Court in *Ram Dayaram Shetty v. International Airports Authority of India*, (1979) 3 SCR 10 (AIR 1979 SC 1628). In that case the Court observed (at p. 1032 of SCR) (p. 1636 of AIR), "Today the Government, as a welfare State, is the regul-



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dispenser of special services and provider of a large number of benefits, including jobs, contracts licences, quotas, mineral rights, etc," the question in that case was whether the International Airport Authority constituted under the International Airports Authority Act, 1971, came within the meaning of the expression. "The State" Art. 12. Under the Act, the Authority was a body corporate having perpetual succession and a common seal and was to consist of a Chairman and certain other members appointed by the Central Government. The Central Government had the power to nominate the appointment of or remove any member from the Board. Although the Authority had no share capital of its own, capital needed by it for carrying out its functions was to be provided only by the Central Government. While considering the question whether such a body corporate was included within the expression "the State", this Court said 1036 SCR):

"A corporation may be created in one or two ways. It may be either established by statute or incorporated under a law such as the Companies Act, 1956 or the Societies Registration Act, 1860. Where a Corporation is wholly controlled by Government not only in its policy making but also in carrying out the functions entrusted to it by the law establishing it or by the charter of its incorporation, there can be no doubt that it would be an instrumentality or agency of Government.

But ordinarily where a corporation is established by statute, it is autonomous in its working, subject only to a provision, often times made, that it shall be bound by any directions that may be issued from time to time by Government in respect of policy matters. So also a corporation incorporated under law is managed by a board of directors or committee of management in accordance with the provisions of the statute under which it is incorporated. When does such a corporation become an instrumentality or agency of Government?"

(Emphasis supplied)

After considering various factors and the case law on the subject, the Court thus summed up the position:

"It will thus be seen that there are several factors which may have to be considered in determining whether a corporation is an agency or instrumentality of Government. We have referred to some of these factors and they may be summarised as under: Whether there is any financial assistance given by the State, and if so what is the magnitude of such assistance whether there is any other form of assistance, given by the State, and if so, whether it is of the usual kind or it is extraordinary, whether there is any control of the management and policies of the corporation by the State and what is the nature and extent of such control, whether the corporation enjoys State conferred or State protected monopoly status and whether the functions carried out by the corporation are public func-



tions closely related to governmental functions. This particularisation of relevant factors is however not exhaustive and by its very nature it cannot be, because with increasing assumption of new tasks, growing complexities of management and administration and the necessity of continuing adjustment in relations between the corporation and Government calling for flexibility, adaptability and innovative skills, it is not possible to make an exhaustive enumeration of the tests which would invariably and in all cases provide an unfailing answer to the question whether a corporation is governmental instrumentality or agency. Moreover even amongst these factors which we have described, no one single factor will yield a satisfactory answer to the question and the Court will have to consider the cumulative effect of these various factors and arrive at its decision on the basis of a particularised inquiry into the facts and circumstances of each case."

In the course of its judgement, the Court distinguished the case of Praga Tools Corporation, (AIR 1969 SC 1306) as also the decision in *S. L. Agarwal v. General Manager, Hindustan Steel Ltd.* (AIR 1970 SC 1150) in very much the same manner as we have done. So far as the case of *Sabhajit Tewari v. Union of India*, (AIR 1975 SC 1329) is concerned, the Court said as follows:

"Lastly, we must refer to the decision in *Sabhajit Tewari v. Union of India* where the question was whether the Council of Scientific and Industrial

Research was an 'authority' within the meaning of Art. 12. The Court in doubt took the view on the basis of facts relevant to the Constitution that it was not an 'authority' but we do not enter into any discussion in this case as to what are the features which must be present before a corporation can be regarded as an 'authority' within the meaning of Art. 12. This decision does not lay down any principle or test for the purpose of determining when a corporation can be said to be an 'authority'. At all any test can be gleaned from this decision, it is whether the Corporation is 'really an agency of the Government'. The Court seemed to hold on the facts that the Council was not an agency of the Government and was, therefore, not an 'authority'.

53. In *Managing Director, U.P. Pradesh Warehousing Corporation v. Vijay Narayan Vajpayee*, (1980) 1 SCR 773 : (AIR 1980 SC 840), an employee of the corporation successfully challenged his dismissal from service. The appellant corporation was established under the Agriculture Produce Development and Warehousing Corporation Act, 1956, and was deemed to be a Warehousing Corporation for a State under the Warehousing Corporation Act, 1962. In his concurring judgement Chinnappa Reddy, said (at page 784 of SCR) : (at pp. 546 of AIR) :

"I find it very hard indeed to discover any distinction, on principle between



ween a person directly under the employment of the Government and a person under the employment of an agency or instrumentality of the Government or a Corporation, set up under a statute or incorporated but wholly owned by the Government. It is self evident and trite to say that the function of the State has long since ceased to be confined to the preservation of the public peace, the exaction of taxes and the defence of its frontiers. It is now the function of the State to secure 'social, economic and political justice', to preserve liberety of thought, expression, belief, faith and worship', and to ensure 'equality of status and of opportunity'.

(Emphasis supplied)

54. In *Ajay Hasia v. Khalid Mujib Sehravardi*, (1981) 2 SCR 79 : AIR 1981 SC 487) the Regional Engineering College which was established and administered and managed by a society registered under the Jammu and Kashmir Registration of Societies Act, 1898, was held to be "the State" within the meaning of Art. 12. In that case the Court said (at p. 94 of SCR) :

"It is undoubtedly true that the corporation is a distinct juristic entity with a corporate structure of its own and it carries on its functions on business principles with a certain amount of autonomy which is necessary as well as useful from the point of view of effective business management, but behind the formal ownership which is cast in corporate mould, the reality is very much the deeply pervasive presence of the

Government. It is really the Government which acts through the instrumentality or agency of the corporation and the juristic veil of corporate personality worn for the purpose of convenience of management and administration cannot be allowed to obliterate the true nature of the reality behind which is the Government. Now it is obvious that if a corporation is an instrumentality or agency of the Government, it must be subject to the same limitations in the field of constitutional law' as the Government itself, though in the eve of the law it would be a distinct and independent legal entity. If the Government acting through its officers is subject to certain constitutional limitations, it must follow a fortiori that the Government acting through the instrumentality or agency of a corporation should equally be subject to the same limitations."

(Emphasis supplied)

After referring to various authorities, the Court summarized the relevant tests which are to be gathered from the *International Airport Authority of India's* case, (AIR 1979 SC 1628) as follows of SCR :

(1) 'One thing is clear that if the entire share capital of the corporation is held by Government it would go a long way towards indicating that the Corporation is an instrumentality or agency of Government.'

(2) where the financial assistance of the State is so much as to meet almost



entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with governmental character.'

(3) 'It may also be a relevant factor .....whether the corporation enjoys monopoly status which is the State conferred or State protected.'

(4) 'Existence of deep and pervasive State control may afford an indication that the Corporation is a State agency or instrumentality.'

(5) 'If the functions of the corporation are of public importance and closely related to governmental functions, it would be a relevant factor in classifying the Corporation as an instrumentality or agency of Government'.

55. The right, title and interest of the Burmah Shell Oil Storage and Distributing Company of India Limited in relation to its undertakings in India were transferred to and vested in the Central Government under S. 3 of the Burmah Shell (Acquisition of Undertakings in India) Act, 1975. Thereafter, under S. 7 of the said Act, the right, title, interest and liabilities of the said company which had become vested in the Central Government, instead of continuing so to vest in it, were directed to be vested in a Government company, as defined by S. 617 of the Companies Act, 1956, namely, Bharat Petroleum. In *Som Prakash Rekhi v. Union of India*, (1981) 2 SCR 111 : (AIR 1981 SC 212) this Court held that Bharat Petroleum fell within the meaning of the expression "the State" used in Art. 12. The follo-

wing passage of SCR : (at p. 218 AIR) from the judgement in that case is instructive and requires to be reproduced :

"For purposes of the Companies Act, 1956, a government company has a distinct personality which cannot be confused with the State. Likewise, a statutory corporation constituted to carry on a commercial or other activity is for many purposes a distinct juristic entity not drowned in the sea of State, although, in substance, its existence may be but a projection of the State. What we wish to emphasise is that merely because a company or other legal person has functional and juristic individuality for certain purposes and in certain areas of law, it does not necessarily follow that for the effective enforcement of fundamental rights under our constitutional scheme, we should not scan the real character of that entity; and if it is found to be a mere agent or surrogate of the State, in fact owned by the State, in truth controlled by the State constitution, lawyers must not blink at these facts and frustrate the enforcement of fundamental rights despite the inclusive definition of Art. 12 that any authority controlled by the Government of India is itself the State. Law has many dimensions and fundamental facts must govern the applicability of fundamental rights in a given situation."

(Emphasis supplied)

56. At the first blush it may appear that the case of *S. S. Dhanda v. Municipal Corporation, Delhi*, (1981)



CC 431 runs counter to the trend in the authorities cited above but on a closer scrutiny it turns out not to be so. The facts in that case were that the Co-operative Store Limited, which was a society registered under the Bombay Co-operative Societies Act, 1955, had established and was managing Super Bazars at different places including at Connaught Place in New Delhi. Under S. 23 of the said Act, the society was a body corporate by the name under which it was registered, with perpetual succession and a common seal. The Super Bazars were not owned by the Central Government but were owned and managed by the said society, though pursuant to an agreement executed between the said society and the Union of India, the Central Government had advanced a loan of rupees forty lakhs to the said society for establishing and managing Super Bazars and it also held more than ninety-seven percent of the shares of the said society. The appellant who was a member of the Indian Administrative Service was sent on deputation as the General Manager of the Super Bazar at Connaught Place. He along with other officials of the Super Bazar was prosecuted under the Prevention of Food Adulteration Act, 1954. He raised a preliminary objection before the Metropolitan Magistrate, Delhi, before whom he was summoned to appear that no cognizance of the alleged offence could be taken by him for want of sanction under S. 197 of the Code of Criminal

Procedure, 1973. On his contention being rejected, he appealed to this Court. Under the said section 197, when any person who is or was inter alia public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court is to take cognizance of such offence except with the previous sanction in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed in connection with the affairs of the Union or of the Central Government. As stated in the opening paragraph of the judgement in the said case, the question before the Court was whether the appellant was a public servant within the meaning of Clause Twelfth of S. 21 of the Indian Penal Code for purposes of Section 197 of the Code of Criminal Procedure. The relevant provisions of Clause Twelfth of S. 21 are as follows :

“21. Public servant.—

The words ‘public servant’ denote a person falling under any of the descriptions hereinafter following, namely :—

X X X

Twelfth — Every person—

(a) in the service or pay of the Government or remunerated by fees or commission for the performance of any public duty the Government :

(b) in the service or pay of a local



authority, a corporation established by or under a Central, Provincial or State Act or a Government company as defined in S. 617 of the Companies Act, 1956."

The Court pointed out that Clause Twelfth did not use the words "body corporate" and, therefore, the question was whether the expression "corporation" contained therein taken in collocation of the words "established by or under a Central or Provincial or State Act" would bring within its sweep a co-operative society. The Court said (of SCR):

"In our opinion, the expression 'corporation, must, in the context, mean a corporation created by the legislature and not a body or society brought into existence by an act of a group individuals. A co-operative society is therefore, not a corporation established by or under an Act of the Central or state legislature."

The Court then proceeded to point out that a corporation is an artificial being created by law, having a legal entity entirely separate and distinct from the individuals who compose it, with the capacity of continuous existence and succession. The Court held that corporations established by or under an Act of Legislature can only mean a body corporate which owes its existence, and not merely its corporate status, to the Act. An association of persons constituting themselves into a company under the Companies Act or a society under the Societies Registration Act owes its existence not to the Act of Legislature but to acts of parties, though it may owe

its status as a body corporate to Act of Legislature. The observations of the Court in that case with respect to companies were not intended by it to apply to Government companies as defined in S. 617 of the Companies Act, 1956, for by the express terms of sub-clause (b) of Clause Twelfth of S. 21 of the Indian Penal Code every person in the service or pay of a Government company as defined in S. 617 of the Companies Act, 1956, is a public servant. The second part of the question which the Court was called upon to decide in this case was whether the appellant can be said to be a person who was employed in connection with the affairs of the Union. The Court held that the Super Bazar was not an instrumentality of the State and, therefore, it could not be said that the appellant was employed in connection with the affairs of the Union within the meaning of the S. 197 of the Code of Criminal Procedure. This observation was again made with reference to the argument that the appellant was employed in connection with the affairs of the Union. He undoubtedly was not employed in connection with the affairs of the Union just as a person employed in a corporation is not and cannot be said to be holding a civil post under the Union or a State. This was held by this Court in *S. L. Agarwal v. General Manager Hindustan Steel Ltd.* (AIR 1970 SC 1150). In *S. S. Dhanoji v. State of Karnataka* (AIR 1981 SC 1395) the Court was not called upon to decide and did not decide whether a Government company was an instrumentality or agency of the State for the purposes of Part III and



of the Constitution and thus, "the  
te" within the meaning of that expres-  
on as used in Art. 12 of the Constitu-  
n.

57. The Indian Statistical Institute  
a society registered under the Societies  
gistration Act, 1860, and is governed  
the Indian statistical Institute Act,  
59, under which its, control completely  
sts in the Union of India. The society  
also wholly financed by the Union of  
dia. In *B.S. Minhas v. Indian Statis-  
al Institute*, (1983) 4 SCC 582 : (AIR  
84 SC 363) this Court, following *Ajay  
sia's case* (AIR 1981 SC 487), held  
t the said society was an "authority"  
thin the meaning of Art 12 and hence  
yrit petition under Art 32 filed agai-  
t it was competent and maintainable  
*Manmohan Singh Jaitla v. Commr.,  
ion Territory of Chandigarh*, (1984)  
pp SCC 540 : (AIR 1985 SC 364)  
s Court once again following *Ajay  
sia's Case* held that an aided school  
ich received a Government grant of  
nety-five per cent was an "authority"  
thin the meaning of Art. 12 and,  
erefore, amenable to the Writ Jurisdi-  
on both of this Court and the High  
ourt.

58. In *Workmen of Hindustan  
eel Ltd, v. Hindustan Steel Ltd.*, (1984)  
pp SCC 554, 560 : (AIR 1985 SC 261  
p. 255) the Court held that the Hin-  
stan Steel Ltd. was a public sector  
dertaking and, therefore, was "other  
thority" within the meaning of that  
pression in Art 12.

59. In *P. K. Ramachndra Iyer v.  
nion of India*, (1984) 2 SCC 141, once

again following *Ajay Hasia's case* (AIR)  
1981 SC 487), the Court held that the  
Indian Council of Agricultural Research  
which was a society registered under the  
Societies Registration Act was an instru-  
mentality of the State falling under the  
expression "other authority" within the  
meaning of Art. 12. The said Council  
was wholly financed by the Government.  
Its budget was voted upon as part of the  
expenses incurred in the Ministry of  
Agriculture. The control of the Govern-  
ment of India permeated through all its  
activities Since its inception, it was  
set up to carry out the recommendations  
of the Royal Commission on Agriculture.  
According to this Court, these facts were  
sufficient to make the said Council an  
instrumentality of the State.

60. In *A.L. Kalra v. Project and  
Equipment Corporation of India Ltd.*  
(1984) 3 SCC 316, 319, 325 the said  
Corporation was held to be an instru-  
mentality of the Central Government  
and hence falling within Art. 12. The  
Project and Equipment Corporation of  
India Ltd. Was a wholly owned subsi-  
diary company of the State Trading  
Corporation but was separately in 1976  
and thereafter functioned as a Govern-  
ment of India undertaking. The finding  
that it was an instrumentality of the  
Central Government was, however,  
based upon concession made by the said  
Corporation.

61. In *West Bengal State Electri-  
city Board v. Desh Bandhu Ghosh*,  
(1985) 3 SCC 116 the West Bengal State  
Electricity Board was held to be an  
instrumentality of the State.



62. As pointed out earlier, the Corporation which is the First Appellant in these Appeals is not only a Government company as defined in S. 617 of the Companies Act, 1956, but is wholly owned by three Governments jointly. It is financed entirely by these three Governments and is completely under the control of the Central Government, and is managed by the Chairman and Board of Directors appointed by the Central Government and removable by it. In every respect it is thus a veil behind which the Central Government operates through the instrumentality of a Government company. The activities carried on by the Corporation are of vital national importance. The Fifth Five Year plan 1974-79 states that the "outlay of Rs. 14.73 crores for the next two years includes development of Rajabagan Dockyard and operation of the Central Inland Water Transport Corporation and operation of river services on the Ganga; According to the Sixth Five Year Plan, 1980-85, inland water transport is recognized as the cheapest mode of transport for certain kinds of commodities provided the points of origin and destination are both located on the water front, that it is one of the most energy efficient modes of transport and has considerable potential in limited areas which have a network of waterways. This plan further emphasises that in the North-Eastern Region where other transport infrastructure is severely lacking and more expensive, inland water transport has an additional impor-

tance as an instrument of development. The said plan goes on to state, "In Central Sector, an outlay of Rs. 12 crores has been made for IWT. The most important programme relates to the investment proposal of Central Inland Water Transport Corporation (CIWTC)". The Annual Plan 1984-85 of the Government of India Planning Commission states as follows in paragraph 10.23 :

**"Inland Water Transport**

Against the approved outlay of Rs. 12 crores in 1983-84, the revised expenditure in the Central Sector is estimated at Rs. 10.40 crores. Bulk of the allocation was for the scheme of Central Inland Water Transport Corporation (CIWTC) for acquisition of vessels, development of Rajabagan Dockyard, creation of infrastructural facilities etc.

The Annual Report 1984-85 of the Government of India, Ministry of Shipping and Transport, states in paragraph 6.1.2 as follows :

"The Inland water Transport Directorate is an attached office of this Ministry headed by a Chief Engineer-cum Administrator. It has a complement of technical officers who are charged with the responsibility for planning and techno-economic studies on waterways and conducting hydrographic surveys. The Directorate has a Regional office at Patna. Two sub-offices of this Regional office have also been sanctioned. One of the sub-offices has been set up at Gauhati and arrangements are under



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to set up the other at Varanasi. The Ministry has also under its control a public sector undertaking, namely, the Central Inland Water Transport Corporation which is the only major company in inland water transport in the country".

(Emphasis supplied)

As shown by the Statement of Objects and Reasons to the Legislative Bill, which when enacted became the National Waterway (Allahabad-Haldia stretch of the Ganga-Bhagirathi-Hooghly River) Act, 1982 (Act No. 49 of 1982), published in the Gazette of India Extraordinary, Part II, S. 2, dated May 1982, at page 15, the Central Government had set up various committees in order to study the advantages in the mode of inland water transport such as its low cost of transport, energy efficiency, generation of employment among weaker sections of the community and less pollution. These committees had recommended that the Central Government should declare certain waterways as national waterways and assume responsibility for their development. A beginning in respect of this matter was thus made by the enactment of the said Act No. 49 of 1982. Under the said stretch declared to be a national waterway it was the responsibility of the Central Government to regulate and develop the national waterway and to secure its efficient utilization for shipping and navigation. In the Demands for Grant for 1985-86 additional provision was made for an overall increase in Budget

Estimates 1985-86 mainly for equity participation/investment in the Corporation. The activities carried on by the Corporation were thus described in the said Demands for Grant :

"Central Inland Water Transport Corporation. - CIWTC runs river services between Calcutta and Assam and Calcutta and Bangladesh. It undertakes movement of oil from Haldia to Budge-Budge/Paharpur for the Indian Oil Corporation. It also undertakes lighterage stevedoring operations, ship building, ship repairing and other engineering services. To meet case losses over riverine and engineering operations, construction of vessels and for purchase of machinery/equipment etc, budget estimates 1985-86 provide Rs. 1350 crores for loan and Rs. 15.41 crores for equity investment in the Corporation".

Last year Parliament passed the Inland Waterways Authority of India Act, 1985. This Act received the assent of the President on December 30, 1985. Under this Act, an Authority called the Inland Waterways Authority of India is to be constituted and it is to be a body corporate by the name aforesaid, having perpetual succession and a common seal, with power, subject to the provisions of the said Act, to acquire, hold and dispose of property, both movable and immovable, and to contract and to sue and be sued by the said name. It is to consist of a Chairman, a Vice-Chairman and other persons not exceeding five. The Chairman, Vice-Chairman and other persons are to be appointed by the Cen-



tral Government. The term of office and other conditions of service of the members of the Authority are to be prescribed by the rules. The Central Government has also the power to remove any member of the Authority or to suspend him pending inquiry against him. Under the said Act, the Authority is, in the discharge of its functions and duties, to be bound by such directions on questions of policy as the Central Government may give in writing to it from time to time.

63. It may be mentioned that neither the said Act nor Act No. 49 of 1982 appears to have been yet brought into force.

64. There can thus be no doubt that the Corporation is a Government undertaking in the public sector. The Corporation itself has considered that it is a Government of India undertaking. The complete heading of the said Rules is "Central Inland water Transport Corporation Limited (A Government of India Undertaking) Service, Discipline & Appeal Rules, 1979".

65. In the face of so much evidence it is ridiculous to describe the Corporation as a trading company as the Appellants have attempted to do. What has been set out above is more than sufficient to show that the activities of the Corporation are of great importance to public, interest, concern and welfare and are activities of the nature carried on by a modern State and particularly a modern Welfare State.

66. It was, however, submitted on behalf of the Appellants that even though the cases, out of those referred to above,

upon which the Appellants had relied upon were either distinguishable or inapplicable for determining the question whether a Government company was "the State" or not, the case of *A. L. Kalra v. Project and Equipment Corporation of India Ltd.* (AIR 1984 SC 1367) relied upon by the Respondents was based upon a concession and there was thus no direct authority on the point in issue. It was further submitted that in the other cases in which various bodies were held to be "the State" Art. 12 was not those which concerned either a statutory authority or a corporation established by a statute.

67. It is true that the decision in *A. L. Kalra v. Project and Equipment Corporation of India Ltd.*, (AIR 1984 SC 1367) was based upon a concession made by the respondent corporation in the case of *Workmen of Hindustan Steel Ltd. v. Hindustan Steel Ltd.*, (AIR 1985 SC 251) was that of a Government company for Hindustan Steel Limited is a Government company as defined by S. 617 of the Companies Act as pointed out in *Gurugobinda Basu v. Sakari Prasad Ghosal*, (1964) 4 SCR 315. The case of the *Workmen of Hindustan Steel Ltd.* related to a question whether a disciplinary inquiry was validly dispensed with under Standing Order No. 32 of the Hindustan Steel Limited. Under that Standing Order, when a workman had been convicted for a criminal offence in a Court of law or where the General Manager was satisfied, for reasons to be recorded in writing, that it was inexpedient or against



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the interest of security to continue employ the workman, the workman may be removed or dismissed from service without following the procedure of holding a disciplinary inquiry laid down in Standing Order No. 31. The order of removal from service of the concerned workman did not set out any reason for the satisfaction arrived at by the disciplinary authority but merely stated that such authority was satisfied that it was no longer expedient to employ the particular workman any further and the order then proceeded to remove him from the service of the company. In these circumstances, this Court held that the order of removal from service was bad in law. In the course of its judgement, this Court observed as follows (of 1984 Suppl SCC):

"It is time for such a public sector undertaking as Hindustan Steel Co. to recast S. O. 32 and to bring it in tune with the philosophy of the institution failing which it being 'other authority' and therefore a State under Art. 12 in an appropriate proceeding, the vires of S. O. will have to be examined. It is not necessary to do so in the present case because even on the terms of S. O. 32 the order made by the General Manager is unsustainable."

The only reason given by the Court holding that Hindustan Steel Ltd. was "other authority" and therefore, "the State" under Art. 12 was the fact that it was a public sector undertaking. In the entire judgement,

there is no other discussion on this point except what is stated in the passage quoted above. Thus, to the extent that there is an authority of this Court in which the question, namely, whether a Government company is "the State" within the meaning of Art. 12 has been discussed and decided, the above submission is correct.

68. Does this, therefore, make any difference? There is a basic fallacy vitiating the above submission. That fallacy lies in the assumption which that submission makes that merely because a point has not fallen for decision by the Court, it should, therefore, not be decided at any time. Were this assumption true, the law would have remained static and would have never advanced the whole process of judicial interpretation lies in extending or applying by analogy the ratio decidendi of an earlier case to a subsequent case which differs from it in certain essentials, so as to make the principle laid down in the earlier case fit in with the new set of circumstances. The sequitur of the above assumption would be that the Court should tell the suitor that there is no precedent governing his case and, therefore, it cannot give him any relief. This would be to do gross injustice. Had this not been done the law would have never advanced. For instance, had *Rylands v. Fletcher* (1888) 3 HL 330 not been decided in the way in which it was, an owner or occupier of land could with impunity have brought and kept on his land anything



likely to do mischief if it escaped and would have himself escaped all liability for the damage caused by such escape if he had not been negligent. Similarly, but for *Donoghue v. Stevenson* (1932) AC 562 manufacturers would have been immune from liability to the ultimate consumers and users of their products.

69. What is the position before us? Is it only one case decided on a concession and another based upon an assumption that a Government company is "the State": under Art 12? That is the position in fact but not in substance. As we have seen, authorities constituted under, and corporations established by, statutes have been held to be instrumentalities and agencies of Government in a long catena of decisions of this Court. The observations in several of these decisions, which have been emphasised by us in the passages extracted from the judgements in those cases, are general in their nature and take in their sweep all instrumentalities and agencies of the State, whatever be the form which such instrumentality or agency may have assumed. Particularly relevant in this connection are the observations of Mathew, J., in *Sukhdev Singh v. Bhagatram Sardar Singh Reghuvanshi*, (AIR 1975 SC 1331) of Bhagwati, J., in the *International Airport Authority's case*, (AIR 1979 SC 1628) and *Ajay Hasia's case*, (AIR 1981 SC 487), and of Chinnappa Reddy, J., in *Uttar Pradesh Warehousing Corporation's case* (AIR 1981 SC 840). If

there is an instrumentality or agency of the State which has assumed the garb of a Government company as defined in S. 617 of the Companies Act, it does not follow that it thereby ceases to be an instrumentality or agency of the State. For the purposes of Art. 12 one must necessarily see through the corporate veil and ascertain whether behind that veil is the face of an instrumentality or agency of the State. The Corporation, which is the Appellant in these two Appeals before us, squarely falls within these observations and it also satisfies the various tests which have been laid down. Mere fact that it has so far not the monopoly of inland water transportation is not sufficient to divest it of its character of an instrumentality or agency of the State. It is nothing but the Government, operating behind a corporate veil, carrying out a governmental activity and governmental functions of vital public importance. There can thus be no doubt that the Corporation is "the State" within the meaning of Art. 12 of the Constitution.

70. We now turn to the second question which falls for determination in these namely Appeals, whether an unconscionable term in a contract of employment entered into with the Corporation, which is "the State" within the meaning of the expression in Art. 12, as being violative of Art. 14. What is challenged under head (i) is clause (i) of Rule 9 of the said Rules. This challenge levelled by the Respondent in each of these two Appeals succeeded in the High Court.



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71. The first point which falls for consideration on this part of the case is whether Rule 9 (i) is unconscionable. In order to ascertain this, we must first examine the facts leading to the making of the said Rules and then the setting in which Rule 9 (i) occurs. To recapitulate briefly, each of the contesting Respondents was in the service of the Rivers Steam Navigation Company Limited. Their services were taken over by the Corporation after the Scheme of Arrangement was sanctioned by the Calcutta High Court. Under the said Scheme of Arrangement, if their services had not been taken over, they would have been entitled to compensation payable to them, either under the Industrial Disputes Act, 1947, or otherwise legally admissible, by the said company, and the Government of India was to provide to the said company the amount of such compensation. Under the letters of appointment issued to these Respondents, the age of superannuation was fifty-five. Thereafter, Service Rules were framed by the Corporation in 1970 which were replaced in 1979 by new rules namely, the said Rules. The said Rules did not apply to employees covered by the Industrial Employment (Standing order) Act, 1946, that is, to workmen or to those in respect of whom the Board of Directors had issued separate orders. At all relevant times, these Respondents were employed mainly in a managerial capacity. No separate orders were issued by the Board of Directors in their case. These Respondents were, therefore admittedly governed by the

said Rules. Under Rule 10 of the said Rules, they were to retire from the service of the Corporation on completion of the age of fifty-eight years though in exceptional cases and in the interest of the Corporation an extension might have been granted to them with the prior approval of the Chairman-cum-Managing Director and the Board of Directors of the Corporation. The said Rules, however, provide four different modes in which the services of the Respondents could have been terminated earlier than the age of superannuation, namely the completion of the age of fifty-eight years. These modes are those provided in Rule 9 (i), Rule 9 (ii), sub-clause (iv) of clause (b) of Rule 36 read with Rule 38, and Rule 37. Of these four modes, the first two apply to permanent employees and the other two apply to all employees. Rule 6 classifies employees as either Permanent or Probationary or Temporary or Casual or Trainee. Clause (i) of Rule 6 defines the expression "permanent employee" as meaning employee whose services have been confirmed in writing according to the Recruitment and promotion Rules". Under Rule 9 (i) which has been extracted above, the employment of a permanent employee is to be subject to termination on three month's notice in writing on either side. If the Corporation gives such a notice of termination, it may pay to the employee the equivalent of three month's basic pay and dearness allowance, if any, in lieu of notice, and where a permanent employee terminates the



employment without giving due notice the Corporation may deduct a like amount from the amount due or payable to the employee. Under Rule 11, an employee who wishes to leave the service of the Corporation by resigning therefrom, is to give to the Corporation the same notice as the Corporation is required to give to him under Rule 9, that is, a three month's notice in writing. Under 9 (ii), the services of a permanent employee can be terminated on the ground of "Services no longer required in the interest of the Company" (that is, the Corporation). In such a case, a permanent employee whose service is terminated under this clause is to be paid fifteen days' basic pay and dearness allowance for each completed year of continuous service in the Corporation and he is also to be entitled to encashment of leave to his credit. Rule 36 prescribes the penalties which can be imposed, "for good and sufficient reasons and as hereinafter provided" in the said Rules, on an employee for his misconduct. Clause (a) of Rule 36 sets out the minor penalties and clause (b) of Rule 36 sets out the major penalties. Under sub-clause (iv) of clause (b) Rule 36, dismissal from service is a major penalty. None of the major penalties including the penalty of dismissal is to be imposed except after holding an inquiry in accordance with the provisions of Rule 38 and until after the inquiring authority, where it is not itself the disciplinary authority, has forwarded to the disciplinary authority the records of the inquiry toge-

ther with its report, and the disciplinary authority has taken its decision provided in Rule 39, Rule 40 prescribes the procedure to be followed in imposing minor penalties. Under Rule 41 notwithstanding anything contained in Rule 38, 39 or 40, the disciplinary authority may dispense with the disciplinary inquiry in the three cases set out in Rule 43 and impose upon an employee either a major or minor penalty. We have reproduced Rule 43 earlier. Rule 45 provides for an appeal against an order imposing any of the penalties specified in Rule 36. Under Rule 46 the Corporation has the right to terminate the service of any employee at any time without any notice if the employee is found guilty of any insubordination or other misconduct or of any breach of any rules pertaining to service or conduct or non-performance of his duties. The said Rules do not require that any disciplinary inquiry should be held before terminating an employee's service under Rule 37.

72. Each of the contesting Respondents in these Appeals was asked to submit his written explanation to the various allegations made against him. Ganguly, the First Respondent, in Civil Appeal No. 4412 of 1985, gave a detailed reply to the said show cause notice. Sengupta, the First Respondent in Civil Appeal No. 4413 of 1985, denied the charges made against him and asked for inspection of the documents and copies of statement of witnesses mentioned in the charge-sheet served



on him to enable him to file his written statement. Without holding any inquiry into the allegations made against them, the services of each of them were terminated by the said letter dated February 5, 1983, under Rule 9 (i). The action was not taken either under Rule 36 or Rule 37 nor was either of them dismissed after applying to his case Rule 43 and dispensing with the disciplinary inquiry.

72A. It was submitted on behalf of the Appellants that there was nothing unconscionable about Rule 9 (i), that Rule 9 (i) was not a nudum pactum or it was supported by mutuality inasmuch as it conferred an equal right upon both parties to terminate the contract of employment, that the grounds which render an agreement void and unenforceable are set out in the Indian Contract Act, 1872 (Act No IX of 1872), that unconscionability was not mentioned in the Indian Contract Act as one of the grounds which invalidates an agreement, that the power conferred by Rule 9 (i) was necessary for the proper functioning of the administration of the Corporation, that in the case of the Respondents this power was exercised by the Chairman-cum-Managing Director of the Corporation, and that a person holding the highest office in the Corporation was not likely to abuse the power conferred by Rule 9 (i).

73. The submissions, on the other hand, were that the parties did not stand on an equal footing and did not enjoy the same bargaining power, that the contract contained in the service rules

was one imposed upon these Respondents, that the power conferred by Rule 9 (i) was arbitrary and uncanalized as it did not set out any guidelines for the exercise of that power and that even assuming it may not be void as a contract; in any event it offended Art 14 as it conferred an absolute and arbitrary power upon the Corporation.

74. As the question before us is of the validity of clause (i) of Rule 9, we will refrain from expressing any opinion with respect to the validity of clause (ii) of Rule 9 or Rule 37 or 40 but will confine ourselves only to Rule 9 (i).

75. The said Rules constitute a part of the contract of employment between the Corporation and its employees to whom the said Rules apply, and thus from a part of the contract of employment between the Corporation and each of the two contesting Respondents. The validity of Rule 9 (i) would, therefore, first fall to be tested by the principles of the law of contracts.

76. Under S. 19 of the Contract Act, when consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract, voidable at the option of the party whose consent was so caused. It is not the case of either of the contesting Respondents that there was any coercion brought to bear upon him or that any fraud or misrepresentation had been practised upon him. Under section 19A, when consent to an agreement is caused by under influence, the agreement is a contract voidable at the



option of the party whose consent was so caused and the Court may set aside any such contract either absolutely or if the party who was entitled to avoid it has received any benefit there-under, upon such terms and conditions as to the Court may seem just. Sub-sec (1) of S. 16 defines "Undue influence" as follows :

"16. Undue influence' defined.—

(1) A contract is said to be induced by 'undue influence' where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other."

The material provisions of Sub-sec. (2) of S. 16 are as follows :

"(2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in position to dominate the will of another—

(a) where he holds a real or apparent authority over the other....."

We need not trouble ourselves with the other sections of the Contract Act except Ss. 23 and 24. Section 23 states that the consideration or object of an agreement is lawful unless inter alia the Court regards it as opposed to public policy. This section further provides that every agreement of which the object or consideration is unlawful is void. Under S. 24, if any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object is unlawful,

the agreement is void. The agreement is, however, not always void in its entirety for it is well settled that if several distinct promises are made for one and the same lawful consideration, and one or more of them be such as the Court will not enforce, that will not of itself prevent the rest from being enforceable. The general rule was stated by Lord Willes, J. in *Pickering v. Ilfracombe Ry. Co.* (1868) 3 CP 235 (at page 235) as follows :

"The general rule is that, where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void; but where you can sever them, whether the illegality be created by statute or by the common law, you may reject the bad part and retain the good".

77. Under which head would an unconscionable bargain fall? If it falls under the head of undue influence, it would be voidable but if it falls under the head of being opposed to public policy, it would be void. No case of the type before us appears to have fallen for decision under the law of contract before any court in India nor has any case on all fours of a Court in any other country been pointed out to us. The word "unconscionable" is defined in the Shorter Oxford English Dictionary, Third Edition, Volume II, page 2222 when used with reference to actions, as "showing no regard for conscience, irreconcilable with what is right or reasonable". An unconscionable bargain would, therefore, be one which is irreconcilable with what is right or reasonable.



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78. Although certain types of contracts were illegal or void, as the case may be, at Common Law, for instance, the contrary to public policy or to permit a legal wrong such as a crime or tort, the general rule was of freedom of contract. This rule was given full effect in the nineteenth century on the ground that the parties were the best judges of their own interests, and if they freely and voluntarily entered into a contract, the only function of the Court was to enforce it. It was considered immaterial that one party was economically in a stronger bargaining position than the other; and if such a party introduced modifications and exceptions to his liability in clauses which are today known as "exemption clauses" and the other party accepted them, then full effect must be given to what the parties intended. Equity, however, interfered in many cases of harsh or unconscionable contracts, such as in the law relating to mortgages, forfeitures, and mortgages. Equity also interfered to set aside harsh or unconscionable contracts for salvage services rendered to a vessel in distress, unconscionable contracts with expectant heirs in which a person, usually a money-lender, gave ready cash to the heir in return for the property which he was to inherit and thus to get such property at a gross undervalue. It also interfered with harsh or unconscionable contracts entered into with poor and ignorant persons who had not received independent advice (See Chitty on Con-

tracts, Twenty-fifth Edition, Volume I, paragraphs 4 and 516).

79. Legislation has also interfered in many cases to prevent one party to a contract from taking undue or unfair advantage of the other. Instances of this type of legislation are usury laws, debt relief laws and laws regulating the hours of work and conditions of service of workmen and their unfair discharge from service, and control orders directing a party to sell a particular essential commodity to another.

80. In this connection, it is useful to note what Chitty has to say about the old ideas of freedom of contract in modern times. The relevant passages are to be found in Chitty on Contracts, Twenty-fifth Edition, Volume I, in paragraph 4, and are as follows:

"These ideas have to a large extent lost their appeal today. Freedom of contract,' it has been said, 'is a reasonable social ideal only to the extent that equality of bargaining power between contracting parties can be assumed, and no injury is done to the economic interests of the community at large.' Freedom of contract is of little value when one party has no alternative between accepting a set of terms proposed by the other or doing without the goods or services offered. Many contracts entered into by public utility undertakings and others take the form of a set of terms fixed in advance by one party and not open to discussion by the other. These are called 'contracts d'adhesion' by French lawyers. Traders frequently contract, not on individually negotiated



terms, but on those contained in a standard form of contract settled by a trade association. And the terms of an employee's contract of employment may be determined by agreement between his trade union and his employer, or by a statutory scheme of employment. Such transactions are nevertheless contracts notwithstanding that freedom of contract is to a great extent lacking.

Where freedom of contract is absent, the disadvantages to consumers or members of the public have to some extent been offset by administrative procedures for consultation and by legislation. Many statutes introduce terms into contracts which the parties are forbidden to exclude, or declare that certain provisions in a contract shall be void. And the Courts have developed a number of devices for refusing to implement exemption clauses by the economically stronger party on the weaker, although they have not recognised in themselves any general power (except by statute) to declare broadly that an exemption clause will not be enforced unless it is reasonable. Again, more recently, certain of the judges appear to have recognised the possibility of relief from contractual obligations on the ground of 'inequality of bargaining power'.

What the French call "contracts d'adhésion", the Americans call "adhesion contracts" or "contracts of adhesion". An "adhesion contract" is defined in Black's Law Dictionary, Fifth Edition, at page 38 as follows:

"Adhesion contract" Standard-

dized contract form offered to consumers of goods and services on essentially 'take it or leave it' basis without affording consumer realistic opportunity to bargain and under such conditions that consumer cannot obtain desired product or service except by acquiescing in form contract. Distinctive feature of adhesion contract is that weaker party has no realistic choice as to its terms not every such contract is unconscionable".

81. The position under the American Law is stated in "Restatement of the Law-Second" as adopted and promulgated by the American Law Institute, Volume II which deals with the law of contracts, in section 208 page 107 as follows:

"S. 208. Unconscionable Contract or Term.

"If a contract or term thereof is unconscionable at the time the contract is made Court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid an unconscionable result."

In the Comments given under this section it is stated at page 107 :

"Like the obligation of good faith and fair dealing (S. 205), the policy against unconscionable contracts or terms applies to a wide variety of types of conduct. The determination that a contract or term is or is not unconscionable is made in the light of its setting, purpose and effect. Relevant factors



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de weaknesses in the contracting  
 ess like those involved in more  
 fic rules as to contractual capacity,  
 d and other invalidating causes; the  
 y also overlaps with rules which  
 er particular bargains or terms  
 rforceable on grounds of public  
 y. Policing against unconscionable  
 racts or terms has sometime been  
 mplished by adverse construction  
 nguage, by manipulation of the  
 s of offer and acceptance or by  
 rminations that the clause is con-  
 y to public policy or to the domi-  
 t purpose of the contract'. Uni-  
 n Commercial Code S. 2—302 Com  
 t 1.....

A bargain is not unconscionable  
 ely because the parties to it are une-  
 l in bargaining position, nor even  
 ause the inequality results in an  
 cation of risks to the weaker party.  
 gross inequality of bargaining  
 er, together with terms unreason-  
 y favourable to the stronger party  
 confirm indications that the tran-  
 ion involved elements of deception  
 ompulsion, or may show that the  
 ker party had no meaningful choice,  
 real alternative, or did not in fact  
 nt or appear to assent to the unfair  
 ns."

(Emphasis supplied)

There is a statute in the United  
 es called the Universal Commercial  
 e which is applicable to contracts  
 ting to sales of goods. Though  
 statute is inapplicable to con-  
 ts not involving sales of goods, it  
 proved very influential in, what

are called in the United States, 'non-  
 sales" cases. It has many times been  
 used either by analogy or because it  
 was felt to embody a general accepted  
 social attitude of fairness going beyond  
 its statutory application to sales of goods.  
 In the Reporter's Note to the said section  
 208, it is stated at page 112 :

"It is to be emphasized that a con-  
 tract of adhesion is not unconscionable  
 per se, and that all unconscionable con-  
 tracts are not contracts of adhesion.  
 Nonetheless, the more standardized the  
 agreement and the less a party may bar-  
 gain meaningfully, the more suscep-  
 tible the contract or a term will be to  
 a claim of unconscionability."

(Emphasis supplied)

The position has been thus summed  
 up by John R. Peden in "The law of  
 Unjust Contracts" published by But-  
 terworths in 1982, at pages 28-29 :

".....Unconscionability repre-  
 sents the end of a cycle commencing  
 with the Aristotelian concept of jus-  
 tice and the Roman law *laesio enormis*,  
 which in turn formed the basis for  
 the medieval church's concept of a just  
 price and condemnation of usury.  
 These philosophies permeated the exre-  
 cise, during the seventeenth and eighte-  
 enth centuries, of the Chancery court's  
 discretionary powers under charge which  
 it upset all kinds of unfair transactions.  
 Subsequently the movement towards  
 economic individualism in the ninete-  
 enth century hardened the exercise of  
 these powers by emphasizing the free  
 dom of the parties to make their own  
 contract. While the principle of *pacta*



Sunt Servanda held dominance, the consensual theory still recognised exceptions where one party was overborne by a fiduciary or entered a contract under duress or as the result of fraud. However these exceptions were limited and had to be strictly proved.

It is suggested that the judicial and legislative trend during the last 30 years in both civil and common law jurisdictions has almost brought the wheel full circle. Both Courts and Parliaments have provided greater protection for weaker parties from harsh contracts. In several jurisdictions this included a general power to grant relief from unconscionable contracts, thereby providing a launching point from which the courts have the opportunity to develop a modern doctrine of unconscionability. American decisions on article 2302 of the UCC have already gone some distance into this new arena....."

The expression "laesio enormis" used in the above passage refers to "laesio ultra dimidium vel enormis" which in Roman law meant the injury sustained by one of the parties to an onerous contract when he had been overreached by the other to the extent of more than one-half of the value of the subject-matter, as for example, when a vendor had not received half the value of property sold, or the purchaser had paid more than double value. The maxim "pacta sunt servanda" referred to in the above pas-

sage means "contracts are to be kept".

82. It would appear from certain recent English cases that the Courts in that country have also begun to recognize the possibility of an unconscionable bargain which could be brought about by economic duress even between parties who may not in economic terms be situated differently (See for instance, *Occidental Worldwide Investment Corp. v. Skibs A/S Avanti* (1976) 1 Lloyd's Rep. 293, *Norfolk Ocean Shipping Co. Ltd. v. Hyundai Construction Co. Ltd.* (1979) QB 70, *Pao On v. Lan Yin Long* (1980) AC 614 and *Universe Tankships of Monrovia v. International Transport Workers Federation* (1981) ICR 129, reversed in (1982) 2 WLR 803, and the commentary on these cases in Chitty on Contracts, Twenty-fifth Edition, Volume I, paragraph 486).

83. Another jurisprudential concept of comparatively modern origin which has affected the law of contracts is the theory of "distributive justice". According to this doctrine distributive fairness and justice in the possession of wealth and property can be achieved not only by taxation but also by regulatory control of private and contractual transactions even though this might involve some sacrifice of individual liberty. In *Lingappa Pochanna Appelwar v. State of Maharashtra*, (1985) 1 SCC 479 : (AIR 1985 SC 389), this Court, while upholding the constitutionality of the Maharashtra Restoration of Lands to Schedule



be Act, 1974, said.

"The present legislation is a typical illustration of the concept of distributive justice, as modern jurists view it. Legislators, Judges and administrators are now familiar with the concept of distributive justice. Our Constitution permits and even directs the State to administer what may be termed 'distributive justice'. The concept of distributive justice in the sphere of law making connotes inter alia, removal of economic inequalities rectifying the injustice resulting in dealings or transactions between equals in society. Law should be used as an instrument of distributive justice to achieve a fair division of wealth among the members of society based upon the principle: 'From each according to his capacity, to each according to his needs'. Distributive justice comprehends more than achieving lessening of inequalities by differential taxation, giving debt relief or redistribution of property owned by one many who have none by imposing levies on holdings, both agricultural and urban, or by direct regulation of contractual transactions by forbidding certain transactions and, perhaps, requiring others. It also means that those who have been deprived of their properties by unconscionable bargains should be restored their property. All such laws may take the form of forced redistribution of wealth as a means of achieving a fair division of material resources among the members of society of there may

be legislative control of unfair agreements."

(Emphasis supplied)

When our Constitution states that it is being enacted in order to give to all the citizens of India "JUSTICE" social, economic and political", when clause (1) of Art. 38 of the Constitution directs the State to strive to promote the welfare of the people by securing and protecting as effectively as it may be social order in which social, economic and political justice shall inform all the institutions of the national life, when clause (2) of Art. 38 directs the State, in particular, to minimize the inequalities in income, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations, and when Art. 39 directs the State that it shall, in particular, direct its policy towards securing that the citizens, men and women equally, have the right to an adequate means of livelihood and that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment and that there should be equal pay for equal work for both men and women, it is the doctrine of distributive justice which is speaking through these words of the Constitution.

84. Yet another theory which has made its emergency in recent years in the sphere of the law of contracts is the test of reasonableness or fairness of a clause in a contract where there is inequality of bargaining power. Lord Denn-



ing, M. R., appears to have been the propounder, and perhaps the originator .....at least in England, of this theory. In *Gillespie Brothers & Co. Ltd. v. Roy Bowles Transport Ltd.*, (1973) 1 QB 400. Where the question was whether an indemnity clause in a contract, on its true construction, relieved the indemnifier from liability arising to the indemnified from his own negligence, Lord Denning said (at pages 415-6):

"The time may come when this process of 'construing' the contract can be pursued no further. The words are too clear to permit of it. Are the courts then powerless? Are they to permit the party to enforce his unreasonable, clause, even when it is so unreasonable, or applied so unreasonably, as to be unconscionable? When it gets to this point, I would say, as I said many years ago:

'there is the vigilance of the common law which, while allowing freedom of contract, watches to see that it is not abused': *John Lee & Son (Grantham) Ltd. v. Railway Executive* (1949) 2 All ER 581, 584 it will not allow a party to exempt himself from his liability at common law when it would be quite unconscionable for him to do so."

(Emphasis supplied)

In the above case the Court of Appeal negatived the defence of the indemnifier that the indemnity clause did not cover the negligence of the indemnified. It was in *Loyds Bank Ltd. v. Bundy*, (1974) 3 All ER 757 that Lord Denning first clearly enunciated his theory of "inequality of bargaining power". He

began his discussion on this part of the case by stating (at page 763):

"There are cases in our books in which the courts will set aside a contract or a transfer of property, when the parties have not met on equal terms, where the one is so strong in bargaining power and the other so weak that, as a matter of common fairness, it is not right that the strong should be allowed to push the weak to the will. Hitherto those exceptional cases have been treated each as a separate category in itself. But I think the time has come when we should try to find a principle to unite them. I do not mean on one side contracts or transactions which are voidable for fraud or misrepresentation or mistake. All those are governed by settled principles. I go on to those where there has been inequality of bargaining power, such as to merit the intervention of the Court."

(Emphasis supplied)

He then referred to various categories of cases and ultimately deduced therefrom a general principle in the following words (at page 765):

"Gathering all together, I would suggest that through all these instances there runs a single thread. They rest on 'inequality of bargaining power'. In the virtue of it, the English law gives relief to one who, without independent advice, enters into a contract on terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own



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ignorance of infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other. When I use the word 'undue' I do not mean to suggest that the principle depends on proof of any wrongdoing. The one who stipulates for an unfair advantage may be moved solely by his own self-interest, unconscious of the distress he is bringing to the other. I have also avoided any reference to the will of the one being 'dominated' or 'overcome' by the other. One who is in extremis need may knowingly consent to a most improvident bargain, solely to relieve the straits in which he finds himself. Again, I do not mean to suggest that every transaction is saved by independent advice. But the absence of it may be fatal. With these explanations, I hope this principle will be found to reconcile the cases."

(Emphasis supplied)

85. Though the House of Lords has not yet appear to have unanimously accepted this theory, the observations of Lord Diplock in *A. Schroeder Music Publishing Co. Ltd. v. Macaulay* (formerly *Instone*) (1974) 1 WLR 1308 are a clear pointer towards this direction. In that case a song writer had entered into an agreement with a music publisher in the standard form whereby the publishers engaged the song writer's exclusive services during the term of the agreement, which was five years. Under the said agreement, the song writer assigned to the publisher the full copyright for the whole world in his musical compositions during the said

term. By another term of the said agreement, if the total royalties during the term of the agreement exceeded pounds 5,000 the agreement was to stand automatically extended by a further period of five years. Under the said agreement, the publisher could determine the agreement at any time by one month's written notice but no corresponding right was given to the song writer. Further, while the publisher had the right to assign the agreement, the song writer agreed not to assign his rights without the publisher's prior written consent. The song writer brought an action claiming inter alia, a declaration that the agreement was contrary to public policy and void. *Plowman, J.*, who heard the action granted the declaration which was sought and the Court of Appeal affirmed his judgement. An appeal filed by the publishers against the judgement of the Court of Appeal was dismissed by the House of Lords. The law Lords held that the said agreement was void as it was in restraint of trade and thus contrary to public policy. In his speech Lord Diplock, however, outlined the theory of reasonableness or fairness of a bargain. The following observations of his on this part of the case require to be reproduced in extenso :

"My Lords, the contract under consideration in this appeal is one whereby the respondent accepted restrictions upon the way in which he would exploit his earning power as a song writer for the next ten years. Because this can be classified as a contract in restraint of trade the rest been



been doing has been to assess the relative bargaining power of the publisher and the song writer at the time the contract was made and to decide whether the publisher had used his superior bargaining power to exact from the song writer promises that were unfairly onerous to him. Your Lordships have not been concerned to inquire whether the public have in fact been deprived of the fruit of the song writer's talents by reason of the restrictions, nor to assess the likelihood that they would be deprived in the future if the contract were permitted to run its full course.

It is, in my view, salutary to acknowledge that in refusing to enforce provisions of a contract whereby one party agrees for the benefit of the other party to exploit or to refrain from exploiting his own earning power, the public policy which the Court is implementing is not some 19th century economic theory about the benefit to the general public of freedom of trade, but the protection of those whose bargaining power is weak against being forced by those whose bargaining power is stronger to enter into bargains that are unconscionable. Under the influence of Bentham and of laissez faire the Courts in the 19th century abandoned the practice of applying the public policy against unconscionable bargains to contracts generally, as they had formerly done to any contract considered to be usurious; but the policy survived in its application to penalty clauses and to relief against forfeiture and also to the special category of con-

tracts in restraint of trade. If one looks at the reasoning of 19th century judges in cases about contracts in restraint of trade one finds lip service paid to current economic theories, but if one looks at what they said in the light of what they did, one finds that they struck down a bargain if they thought it was unconscionable as between the parties to it and upheld it if they thought it was not.

So I would hold that the question to be answered as respects a contract in restraint of trade of the kind with which this appeal is concerned is "was the bargain fair?" The test of fairness is, no doubt, whether the restrictions are both reasonably necessary for the protection of the legitimate interests of the promisee and commensurate with the benefits secured to the promisor under the contract. For the purpose of this test all the provisions of the contract must be taken into consideration. (Emphasis supplied)

Lord Diplock then proceeded to point out that there are two kinds of standard forms of contracts. The first is of contracts which contain standard clauses which "have been settled over the years by negotiation by representatives of the commercial interests involved and have been widely adopted because experience has shown that they facilitate the conduct of trade." He then proceeded to state, "If fairness and reasonableness were relevant to the enforceability the fact that they were used by parties whose bargaining power is fairly matched would raise a strong



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Judge

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assumption that their terms are fair and reasonable". Referring to the other kind of standard form of contract Lord Diplock said (at page 1316):

"The same presumption, however, does not apply to the other kind of standard form of contract. This is of comparatively modern origin. It is the result of the concentration of particular kinds of business in relatively few hands. The ticket cases in the 19th century provide what are probably the first examples. The terms of this kind of standard form of contract have not been the subject of negotiation between the parties to it, or approved by any organisation representing the interests of the weaker party. They have been dictated by that party whose bargaining power is either exercised alone or in conjunction with others providing similar goods or services, enables him to say: 'If you want these goods or services at all, these are the only terms on which they are obtainable. Take it or leave it'. To be in a position to adopt this attitude towards a party desirous of entering into a contract to obtain goods or services provides a classic instance of superior bargaining power".

(Emphasis Supplied)

86. The observations of Lord Denning, M. R., in *Lavison v. Patent Carpet Co. Ltd.* (1978) 1 QB 1, are also useful and require to be quoted. These observations are as follows

(at page 79):

"In such circumstances as here the Law Commission in 1975 Commission in 1975 recommended that a term which exempts the stronger party from his ordinary common law liability should not be given effect except when it is reasonable; see The Law Commission and the Scottish Law Commission Report, Exemption Clauses, Second Report (1975) (August 5, 1975), Law Com, No. 69 (H. C. 605), pp. 62, 174; and there is a bill now before parliament which gives effect to the test of reasonableness. This is a gratifying piece of law reform: but I do not think we need wait for that bill to be passed into law. You never know what may happen to a bill. Meanwhile the common law has its own principles ready to hand. In *Gillespie Bros. & Co. Ltd. v. Ray Bowles Transport Ltd.* (1973) 1 QB 400, 416. I suggested that an exemption or limitation Clause should not be given effect if it was unreasonable, or if it would be unreasonable to apply it in the circumstances of the case. I see no reason why this should not be applied today, at any rate in contracts in standard forms where there is inequality of bargaining power".

87. The Bill referred to by Lord Denning in the above passage, when enacted, became the Unfair Contract Terms Act' 1977. This statute does not apply to all Contracts but only to certain Classes of them. It also does not



apply to contracts entered into before the date on which it came into force, namely, February 1, 1978; but subject to this it applies to liability for any loss or damage which is suffered on or after that date, strikes at clauses excluding or restricting liability in certain classes of contracts and torts and introduces in respect of clauses of this type test of reasonableness and prescribes the guidelines for determining their reasonableness. The detailed provisions of this statute do not concern us but they are worth a study.

88. In *Photo Production Ltd. v. Securicor Transport Ltd.*, (1980) AC 827, a case before the Unfair Contract Terms Act, 1977, was enacted, the House of Lords upheld an exemption clause in a contract on the defendants' printed form containing standard conditions. The decision appears to proceed on the ground that the parties were businessmen and did not possess unequal bargaining power. The House of Lords did not in that case reject the test of reasonableness or fairness of a Clause in a contract where the parties are not equal in bargaining position. On the contrary, the speeches of Lord Wilberforce, Lord Diplock and Lord Scarman would seem to show that the House of Lords in a fit case would accept that test. Lord Wilberforce in his speech, after referring to the Unfair Contract Terms Act, 1977, said (at page 843):

"This Act applies to consumer contracts and those based on stan-

dard enables exception clauses to be applied with regard to what is just and reasonable. It is significant that Parliament refrained from legislating over the whole field of contract. After this Act, in commercial matters generally, when the parties are not of unequal bargaining power, and where risks are normally borne by insurance, not only is the case for judicial intervention undemonstrated, but there is everything to be said, and this seems to have been Parliament's intention, for leaving the parties free to apportion the risks as they think fit and for respecting their decisions".

(Emphasis supplied)

Lord Diplock said (at pages 850-51)

"Since the obligations implied by law in a commercial contract are those which by judicial consensus over the years or by Parliament in passing statute, have been regarded as obligations which a reasonable businessman would realise that he was accepting when he entered into a contract of a particular kind, the court's view of the reasonableness of any departure from the implied obligations, which would be involved in construing the expressive words of an exclusion clause in one sense that they are capable of bearing rather than another, is a relevant consideration in deciding what meaning the words were intended by the parties to bear."

(Emphasis supplied)



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Scarman, while agreeing with Wilberforce, described (at page 853) the action out of which the appeal before the House had arisen as "a commercial dispute between parties well able to take care of themselves" and then added, "in such a situation what the parties intended (expressly or impliedly) is what matters; and the duty of the courts is to give effect to their contract according to its true meaning."

89. As seen above, apart from judicial decisions, the United States and the United Kingdom have statutorily recognized, at least in certain areas of law, the principle that there can be no contract where there is inequality of bargaining power between parties although arising out of circumstances not within their control or as a result of situations not of their creation. Other legal systems also permit judicial review of a contractual transaction entered into in similar circumstances. For example, section 138 (2) of the German Civil Code provides that transaction is void "when a person" exploits "the weakness of another, his inexperienced situation, his lack of mental ability, or grave weakness of will of another to obtain the grant of pecuniary advantages..... which are obviously disproportionate to the performance given in return." This position according to the French law is very much the same.

Should then our courts not adva-

nance with the times? Should they still continue to cling to outmoded concepts and outworn ideologies? Should we not adjust our thinking caps to match the fashion of the day? Should all jurisprudential development pass us by, leaving us floundering in the sloughs of nineteenth-century theories? Should the strong be permitted to push the weak to the wall? Should they be allowed to ride roughshod over the weak? Should the courts sit back and watch supinely while the strong trample under foot the rights of the weak? We have a Constitution for our country. Our judges are bound by their oath to "uphold the Constitution and the laws". The Constitution was enacted to secure to all the citizens of this country social and economic justice. Article 14 of the Constitution guarantees to all persons equality before the law and the equal protection of the laws. The principle deducible from the above discussion on this part of the case is in consonance with right and reason, intended to secure social and economic justice and conforms to the mandate of the great equality clause in Art. 14. This principle is that the courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract, or an unfair and unreasonable clause in a contract, entered into between parties who are not equal in bargaining power. It is difficult to give an exhaustive list of all bargains of this type. No court can visualize the different situations which can arise in the affairs



of men. One can only attempt to give some illustration. For instance, the above principle will apply where the inequality of bargaining power is the result of the great disparity in the economic strength of the contracting parties. It will apply where the inequality is the result of circumstances, whether of the creation of the parties or not. It will apply to situations in which the weaker party is in a position in which he can obtain goods or services or means of livelihood only upon the terms imposed by the stronger party or go without them. It will also apply where a man has no choice, or rather no meaningful choice, but to give his assent to a contract or to sign on the dotted line in a prescribed or standard form, or to accept a set of rules as part of the contract, however unfair, unreasonable and unconscionable a clause in that contract or form or rules may be. This principle, however, will not apply where the bargaining power of the contracting parties is equal or almost equal. This principle may not apply where both parties are businessmen and the contract is a commercial transaction. In today's complex world of giant corporations their vast infra-structural organizations and with the State through its instrumentalities and agencies entering into almost every branch of industry and commerce, there can be myriad situations which result in unfair and unreasonable bargains between parties possessing wholly disproportionate and unequal bargaining power. These cases can neither be enumerated nor fully

illustrated. The Court must judge each case on its own facts and circumstances.

91. It is not as if our civil courts have no power under the existing law. Under section 31(1) of the Specific Relief Act, 1963 (Act No. 47 of 1963), a person against whom an instrument is void or voidable, and who has reasonable apprehension that such instrument if left outstanding, may cause him serious injury, may sue to have it adjudged void or voidable, and the court may in its discretion so adjudge it and order it to be delivered up and cancelled.

92. Is a contract of the type mentioned above to be adjudged voidable or void? If it was induced by undue influence, then under section 19A of the Indian Contract Act, it would be voidable. It is, however, rarely that contracts of the types to which the principle formulated by us above applies are induced by undue influence as defined by us 16(1) of the Contract Act, even though at times they are between parties one of whom holds a real or apparent authority over the other. In the vast majority of cases, however such contracts are entered into by the weaker party under pressure of circumstances generally economic, which result in inequality of bargaining power. Such contracts will not fall within the four corners of the definition of 'undue influence' given in section 16(1) of the Act. Further the majority of such contracts are in a standard or prescribed form and consist of a set of rules. They are contracts between individuals containing



terms meant for those individuals  
ne. Contracts in prescribed or  
standard forms or which embody a set  
rules as part of the contract are  
entered into by the party with superior  
bargaining power with a large number  
persons who have far less bargaining  
power or no bargaining power at all.  
Such contracts which affect a large  
number of persons or a group or groups  
of persons, if they are unconscionable,  
unfair and unreasonable, are injurious  
to the public interest. To say that such  
contract is only voidable would do to  
compel each person with whom the  
party with superior bargaining power  
has contracted to go to court to have  
the contract adjudged voidable. This  
would only result in multiplicity  
of litigation which no court should  
encourage and would also not be in the  
public interest. Such a contract or such  
a clause in a contract ought, therefore,  
to be adjudged void. While the law  
of contracts in England is mostly judge  
made, the law of contracts in India is  
enacted in a statute, namely, the Indian  
Contract Act, 1872. In order that such  
contract should be void, it must fall  
under one of the relevant sections of the  
Indian Contract Act. The only relevant  
provision in the Indian Contract Act  
which can apply is S. 23 when it states  
that "The consideration or object of an  
agreement is lawful, unless...the court  
regards it as...opposed to public  
policy."

93. The Contract Act does not  
define the expression "public policy" or  
"opposed to public policy". From the

very nature of things, the expressions  
"public policy", "opposed to public  
policy" or "contrary to public policy"  
are incapable of precise definition.  
Public policy, however, is not the policy  
of a particular government. It connotes  
some matter which concerns the public  
good and the public interest. The con-  
cept of what is for the public good or  
in the public interest or what would  
be injurious or harmful to the public  
good or the public interest has varied  
from time to time. As new concepts  
take the place of old, transactions which  
were once considered against public  
policy are now being upheld by the  
courts and similarly where there has  
been a well-recognized head of public  
policy, the courts have not shirked  
from extending it to new transactions  
and changed circumstances and have at  
times not even flinched from inventing  
a new head of public policy. There are  
two schools of thought—"the narrow  
view" school and "the broad view"  
school. According to the former,  
courts cannot create new heads of  
public policy whereas the latter counte-  
nance judicial law-making in this area.  
The adherents of "the narrow view"  
school would not invalidate a contract  
on the ground of public policy unless  
that particular ground had been well  
established by authorities. Hardly ever  
has the voice of the timorous spoken  
more clearly and loudly than in these  
words of Lord Devey in *Janson v. Drie-  
fontein Consolidated Mines, Limited*  
(1902) Act 484, 500, "public policy is al-  
ways an unsafe and treacherous ground



for legal decision." That was in the year 1902. Seventy-eight years earlier, Burrough, J., in *Richardson v. Mellish* (1824) 2 Bing 229, 252 SC 130 ER 294, 303, and (1824, 34) All ER Reprint 258, 266, described public policy as "a very unruly horse, and when once you get astride it you never know where it will carry you." The Master of the Rolls, Lord Denning, however, was not a man to shy away from unmanageable horses and in words which enjure up before our eyes the picture of the young Alexander the Great Taming Bucephalus, he said in *Enderby Town Football Club Ltd. v. Football Association Ltd.* (1971) Ch 591, 606, "With a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles" Had the timorous always held the field, not only the doctrine of public policy but even the Common Law or the principles of Equity would never have evolved. Sir William Holdsworth in his "History of English Law," Volume III, page 55, has said :

'In fact, a body of law like the common law, which has grown up gradually with the growth of the nation, necessarily acquires some fixed principles, and if it is to maintain these principles it must be able, on the ground of public policy or some other like ground, to suppress practices which, under ever new disguises, seek to weaken or negative them.'

It is thus clear that the principles governing public policy must be and are capable, on proper occasion, of expansion or modification.

practices which were considered perfectly normal at one time have today become obnoxious and oppressive to public conscience. If there is on head of public policy which covers a case, then the court must in consonance with public conscience and in keeping with public good and public interest declare such practice to be opposed to public policy. Above all, in deciding any case which may not be covered by authority of courts have before them the beacon light of the Preamble to the Constitution. Lacking precedent, the court can always be guided by that light and the principles underlying the Fundamental Rights and the Directive Principles enshrined in our Constitution.

94. The normal rule of Common Law has been that a party who seeks to enforce an agreement which is opposed to public policy will be non-suited. The case of *A. Schroeder Music Publishing Co. Ltd. v. Macaulay* (1974 1 WL 1308), however, establishes that where a contract is vitiated as being contrary to public policy, the party adversely affected by it can sue to have it declared void. The case may be different where the purpose of the contract is illegal or immoral. In *Kedar Nath Motani v. Prahlad Rai* (1960) 1 SC 861 : (AIR 1960 SC 213) reversing the High Court and restoring the decree passed by the trial court declaring the appellants' title to the lands in suit and directing the respondents who were the appellants' benamidars to restore possession, this Court, after discussing the



sh and Indian law on the subject,  
p:

“The correct position in law, in our  
ion, is that what one has to see is  
her the illegality goes so much to  
root of the matter that the plaintiff  
not bring his action without relying  
the illegal transaction into which  
had entered. If the illegality be  
l or venial, as stated by williston  
the plaintiff is not required to rest  
ase upon that illegality, then public  
y demands that the defendant sho-  
not be allowed to take advantage of  
position. A strict view, of course,  
be taken of the plaintiff's conduct,  
he should not be allowed to circum-  
the illegality by resorting to some  
erfuge or by misstating the facts.  
However, the matter is clear and the  
ality is not required to be pleaded  
roved as part of the cause of action  
the plaintiff recanted before the  
l purpose was achieved, then unless  
of such a gross nature as to out-  
the conscience of the Court, the  
of the defendant should not pre-

The types of contracts to which the  
inciple formulated by us above applies  
not contracts which are tainted with  
ality but are contracts which contain  
s which are so unfair and unreason-  
e that they shock the conscience of  
court. They are opposed to public  
y and require to be adjudged void.

95. We will now test the validity of  
(i) by applying to it the principle  
ulated above. Each of the contest-

ing Respondents was in the service of  
the Rivers Steam Navigation Company  
Limited and on the said Scheme of  
Arrangement being sanctioned by the  
Calcutta High Court, he was offered  
employment in the Corporation which  
he had accepted. Even had these Res-  
pondents not liked to work for the Cor-  
poration, they had not much of a choice  
because all that they would have got  
was “all legitimate and legal compensa-  
tion payable to them either under the  
Industrial Disputes Act or otherwise  
legally Admissible”. These Respon-  
dents were not covered by the Industrial  
Disputes Act for they were not workmen  
but were officers of the said company.  
It is, therefore, difficult they visualize  
what compensation they would have  
been entitled to get unless their contract  
of employment with their previous  
employers contained any provision in  
that behalf. So far as the original terms  
of employment with the Corporation  
are concerned, they are contained in  
the letters of appointment issued to the  
contesting Respondents. These letters  
of appointment are in a stereotype form  
Under these letters of appointment, the  
Corporation could without any previ-  
ous notice terminate their service, if  
the Corporation is satisfied on medical  
evidence that the employee was unfit  
and was likely for a considerable time  
to continue to be unfit for the discharge  
of his duties. The Corporation could  
also without any previous notice dis-  
miss either of them, if he was guilty of  
any insubordination, intemperance or  
other misconduct, or of any breach of



any rules pertaining to his service or conduct or non-performance of his duties. The above terms are followed by a set of terms under the heading "Other Conditions". One of these terms stated that "You shall be subject to the service rules and regulations including the conduct rules". Undoubtedly, the contesting Respondents accepted appointment with the Corporation upon these terms. They had, however, no real choice before them. Had they not accepted the appointments, they would have at the highest received some compensation which would have been probably meagre and would certainly have exposed themselves to the hazard of finding another job.

96. It was argued before us on behalf of the contesting Respondents that the term that these Respondents would be subject to the service rules and regulations including the conduct rules, since it came under the heading "Other Conditions" which followed the clauses which related to the termination of service, referred only to service rules and regulations other than those providing for termination of service and, therefore, Rule 9 (i) did not apply to them. It is unnecessary to decide this question in the view which we are inclined to take with respect to the validity of Rule 9 (i).

97. The said Rules as also the earlier rules of 1970 were accepted by the contesting Respondents without demur. Here again they had no real choice before them. They had risen

higher in the hierarchy of the Corporation. If they had refused to accept the said Rules it would have resulted in termination of their service' and consequent anxiety, harassment and uncertainty of finding alternative employment.

98. Rule 9 (i) confers upon the Corporation the power to terminate the service of a permanent employee by giving him three months' notice in writing or in lieu thereof to pay him an amount equivalent of three months' basic salary and dearness allowance. A similar regulation framed by the West Bengal State Electricity Board was described by the Court in *West Bengal State Electricity Board v. Desh Bandhu Ghosh*, (1973) 3 SCC 116 :

"..... a naked 'hire and fire' is the time for banishing which altogether from employer-employee relations is fast approaching. Its only parallel is to be found in the Henry VIII clause so familiar to administrative lawyers."

As all lawyers may not be familiar with administrative law, we may as well explain that "the Henry VIII clause is a provision occasionally found in legislation conferring delegated legislative power, giving the delegate power to amend the delegating Act or order to bring that Act into full operation or otherwise by Order to remove any difficulty, and at times giving power to modify the provisions of other Acts also. The Committee on Ministers' Powers in its report submitted in 1932 (Cmd. 4060) pointed out that s



provision had been nicknamed "the VIII clause" because "that king regarded popularly as the impersonation of executive autocracy". The Committee's Report (at page 61) criticised such clauses as a temptation to slipshod work in the preparation of bills and recommended that such provisions should be used only where they were justified before Parliament on compelling grounds. Legislation enacted by Parliament in the United Kingdom in 1932 does not show that this recommendation had any particular effect.

9. No apter description of Rule 9 can be given than to call it "the VIII Clause". It confers absolute and arbitrary power upon the Corporation. It does not even state on behalf of the Corporation is to exercise that power. It was submitted on behalf of the Appellants that it would be the Board of Directors. The impugned letters of termination, however, do not refer to any resolution or decision of the Board and even if they did, it would be irrelevant to the validity of Rule 9 (i). There are no guidelines whatever laid down to indicate in what circumstances the power given by Rule 9 (i) is to be exercised by the Corporation. No opportunity whatever of a hearing is at all afforded to the permanent employee whose service is being terminated in the exercise of this power. It was found that the Board of Directors did not exercise this power arbitrarily or capriciously as it consists of respectable and highly placed persons.

This submission ignores the fact that however highly placed a person may be, he must necessarily possess human frailties. It also overlooks the well-known saying of Lord Acton, which has now almost become a maxim, in the Appendix to his "Historical Essays and Studies", that "power tends to corrupt, and absolute power corrupts absolutely." As we have pointed out earlier, the said Rules provide for four different modes in which the services of a permanent employee can be terminated earlier than his attaining the age of superannuation, namely R. 9 (i), R. 9 (ii), sub-cl. (iv) of Cl. (b) of R. 36 read with R. 38 and R. 37. Under R. 9 (ii) the termination of service is to be on the ground of "services no longer required in the interest of the Company". Sub-cl. (iv) of Cl. (v) of R. 36 read with R. 38 provides for dismissal on the ground of misconduct. Rule 37 provides for termination of service at any time without any notice if the employee is found guilty of any of the acts mentioned in that Rule. Rule 9 (i) is the only Rule which does not state in what circumstances the power conferred by that Rule is to be exercised. Thus, even where the Corporation could proceed under Rule 36 and dismiss an employee on the ground of misconduct after holding a regular disciplinary inquiry, it is free to resort instead to R. 9 (i) in order to avoid the hustle of an inquiry. Rule 9 (i) thus confers an absolute arbitrary and unguided power upon the Corporation. It violates one of the



two great rules of natural justice - the audi alteram partem rule. It is not only in cases to which Art. 14 applies that the rules of natural justice come into play. As pointed out in *Union of India v. Tulsiram, Patel*, (1985) 3 SCC 398 (at page 463) : (AIR 1985 SC 1416 at p. 1451). "The principles of natural justice are not the creation of Art. 14. Art. 14 is not their begetter but their constitutional guardian. "That case has traced in some detail the origin and development of the concept of principles of natural justice and of the audi alteram partem rule (at pages 463-480) (of 1985) 3 SCC) : (at pp. 1451-1463 of AIR). They apply in diverse situations and not only to cases of State action. As pointed out by O. Chinnappa Reddy, J., in *Swadeshi Cotton Mills v. Union of India*, (1981) 2 SCR 533 591 : (AIR 1981 SC 818, 846-47) they are implicit in every decision-making function, whether judicial or quasi-judicial or administrative. Undoubtedly, in certain circumstances the principles of natural justice can be modified and, in exceptional cases, can even be excluded as pointed out in *Tulsiram Patel's case* (AIR 1985 SC 1416). Rule 9 (i), however, is not covered by any of the situations which would justify the total exclusion of the audi alteram partem rule.

100. The power conferred by Rule 9 (i) is not only arbitrary but is also discriminatory for it enables the Corporation to discriminate between employee and employee. It can pick up one-employee and apply to him Clause (1)

of rule 9. It can pick up another employee and apply to him (ii) of Rule 9. It can pick up another employee and apply to sub-clause (iv) of clause (b) of 36 read with Rule 38 and to yet another employee it can apply Rule 38. All this the Corporation can do if the same circumstances exist as to justify the Corporation in holding under Rule 38 a regular disciplinary inquiry into the alleged misconduct of the employee. Both the contesting Respondents in fact, been asked to submit explanation to the charges made against them. Sengupta had been asked that a disciplinary inquiry proposed to be held in his case. The charges made against both the Respondents were such that a disciplinary inquiry could easily have been held in his case. It was, however, not held but instead the Corporation was had to Rule 9 (i).

101. The Corporation is a public organization. It has offices in various parts of West Bengal, Bihar and Assam as shown by the said Rules, and possibly in other States also. The Rules form part of the contract of employment between the Corporation and its employees who are not workmen. These employees had no powerful workmen's Union to support them. They had no voice in the framing of the said Rules. They had no choice but to accept the said Rules as part of their contract of employment. There is gross disparity between the Corporation and its employees, whether



be workmen or officers. The Corporation can afford to dispense with the services of an officer. It will find hundreds of others to take his place but an officer cannot afford to lose his job because if he does so, there are not hundreds of jobs waiting for him. A clause such as clause (i) of Rule 9 is against right and reason. It is wholly unconscionable. It has been entered into between parties between whom there is gross inequality of bargaining power. Rule 9 (i) is a term of the contract between the Corporation and all its officers. It affects a large number of persons and it squarely falls within the principle formulated by us above. Several statutory authorities have a clause similar to Rule 9 (i) in their contracts of employment. As appears from the decided cases, the West Bengal State Electricity Board and Air India International have it. Several Government companies apart from the Corporation (which is the First Appellant before us) must be having it. There are 970 Government companies with paid-up capital of Rs. 16,414,9 crores as stated in the written arguments submitted on behalf of the Union of India. The Government and its agencies and instrumentalities constitute the largest employer in the country. A clause such as Rule 9 (i) in a contract of employment affecting large sections of the public is harmful and injurious to the public interest for it tends to create a sense of insecurity in the minds of those to whom it applies and consequently it is against public good. Such

a clause, therefore, is opposed to public policy and being opposed to public policy, it is void under section 23 of the Indian Contract Act.

102. It was, however, submitted on behalf of the Appellants that this was a contract entered into by the Corporation like any other contract entered into by it in the course of its trading activities and the Court, therefore, ought not to interfere with it. It is not possible for us to equate employees with goods which can be bought and sold. It is equally not possible for us to equate a contract of employment with a mercantile transaction between two businessmen and much less to do so when the contract of employment is between a powerful employer and a weak employee.

103. It was also submitted on behalf of the Appellants that Rule 9 (i) was supported by mutuality inasmuch as it conferred an equal right upon both the parties, for under it just as the employer could terminate the employee's service by giving him three months' notice or by paying him three months' basic pay and dearness allowance in lieu thereof, the employee could leave the service by giving three months' notice and when he failed to give such notice, the Corporation could deduct an equivalent amount from whatever may be payable to him. It is true that there is mutuality in clause 9 (i) the same mutuality as in a contract between the lion and the lamb that both will be free to roam about in the jungle and each will be at



liberty to devour the other. When one considers the unequal position of the Corporation and its employees, the argument of mutuality becomes laughable.

104. The contesting Respondents could, therefore, have filed a civil suit for a declaration that the termination of their service was contrary to law on the ground that the said Rule 9 (i) was void. In such a suit, however, they would have got a declaration and possibly damages for wrongful termination of service but the civil court could not have ordered reinstatement as it would have amounted to granting specific performance of a contract of personal service. As the Corporation is 'the State', they, therefore, adopted the far more efficacious remedy of filing a writ petition under Article 226 of the Constitution.

105. As the Corporation is "the State" within the meaning of Article 12, It was amenable to the writ jurisdiction of the High Court under Article 226. It is now well established that an instrumentality or agency of the State being "the State" under Article 12 of the Constitution is subject to the Constitutional limitations, and its actions are State actions and must be judged in the light of the Fundamental Rights guaranteed by Part III of the Constitution (see, for instance, *Sukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi*, (AIR 1975 SC 1331). The International Airport Authority's case (AIR 1975 SC 1628) and *Ajay Hasia's* case

(AIR 1981 SC 487). The actions of instrumentality or agency of the State must, therefore, be in conformity with Art. 14 of the Constitution. The progression of the judicial concept of Art. 14 from a prohibition against discriminatory class legislation to an invalidating factor for any discriminatory or arbitrary State action has been traced in *Tulsiram Patel's* case (1985) 3 SCC 39 (at pages 473-476) : (AIR 1985 SC 141 at pp. 1458-1460). The principles of natural justice have now come to be recognized as being a part of the Constitutional guarantee contained in Art. 14. In *Tulsiram Patel's* case his Court said

'The principles of natural justice have thus come to be recognized as being a part of the guarantee contained in Article 14 because of the new and dynamic interpretation given by this Court to the concept of equality which is the subject-matter of that Article. Shortly put, the syllogism runs thus: violation of a rule of natural justice results in arbitrariness which is the same as discrimination, where discrimination is the result of State action, it is a violation of Article 14; therefore, a violation of a principle of natural justice by a State action is a violation of Article 14. Article 14, however, is not the sole repository of the principles of natural justice. What it does is to guarantee that any law or State action violating them will be struck down. The principles of natural justice, however, apply not only to legislation and State action but also where any tribunal, authority or body of men, not coming



in the definition of 'State' in Article 14 is charged with the duty of deciding the matter'.

106. As pointed out above, Rule 9 is both arbitrary and unreasonable and it also wholly ignores and sets aside the audi alteram partem rule it, therefore, violates, Art. 14 of the Constitu-

107. On behalf of the appellants, reliance was placed upon the case of *Radhakrishna Agarwal v. State of Bihar* (1971) 3 SCR 249. The facts in that case were that a contract, called a "lease", to collect and exploit sal seeds in a forest area was entered into between the State of Bihar and the appellants in that case. Under one of the clauses of the said contract, the rate of royalty could be revised at the expiry of every three years in consultation with the lessee and was to be binding on the State. The State unilaterally revised the rate of royalty payable by the appellants and thereafter cancelled the lease. The Patna High Court dismissed the petition filed by the appellants and their appellants' appeal to this Court was dismissed. In that case it was held that when a State acts purely in its executive capacity, it is bound by the obligations which dealings of the State with individual citizens import into every transaction entered into in exercise of its constitutional powers, but this is not the case at the time of entry into the field of ordinary contract relations

are no longer governed by the constitutional provisions but by the legally valid contract which determines rights and obligations of the parties inter se. The Court then added (at page 255) (of SCR) :

"No question arises of violation of Article 14 or of any other constitutional provision when the State or its agents, purporting to act within this field, perform any act. In this sphere, they can only claim rights conferred upon them by contract and are bound by the terms of the contract only unless some statute steps in and confers some special statutory power or obligation on the State in the contractual field which is apart from contract."

108. We fail to see what relevance that decision has to the case before us. Employees of a large organization form a separate and distinct class and we are unable to equate a contract of employment in a stereo type form entered into by "The State" with each of such employees with the "lease" executed in *Radhakrishna Agarwal's* case. Further, the contract or the lease between the parties in that case was a legally valid contract. In that case what the appellants were doing was to complain of a breach of contract committed by the State of Bihar acting through its officers. The contesting Respondents are not complaining of any breach of contract but their contention is that Rule 9 (i) which is a term of their contract of employment is void. They are not complaining that the action of termination of their service is in breach of Rule 9 (i). Their complaint



is not merely with respect to the State action taken under Rule 9 (i) but also with respect to the action of the State in entering into a contract of employment with them which contains such a clause or rather forcing upon them a contract of employment containing such a clause. As we have held earlier, Rule 9 (i) is void even under the ordinary law of contracts.

109. We must now turn to two decision of the Bombay High Court as each party has relied strongly upon one of them, namely, *S. S. Muley v. J. R. D. Tata*; 1980 Lab IC 11 : (1979) 2 Serv LR 438 and *Manohar P. Kharkar v. Raghuraj* (1981) 2 Lab LJ 459 : (1983 Lab IC 350), commonly known as the "Makalu case" as it related to certain cables which were damaged in an aircraft named 'Makalu' belonging to Air India International. The decision in Muley's case (1980 Lab IC 11) (Bom) was relied upon by the Respondents while the decision in Makalu's case (1983 Lab IC 350) (Bom) was relied upon by the Appellants Both the cases related to Regulation 48 of the Air India Employees' Service Regulations framed by Air India International. Air India International is a corporation established under the Air Corporations Act, 1953 (Act No. 27 of 1953) and it is indisputably "The State" within the meaning of Article 12 of the Constitution. Under clause (a) of the said Regulation 48, the services of a permanent employee can be terminated "without assigning any reason" by giving him

thirty days, notice in writing or pay lieu of notice. In both these cases the services of the concerned employees were terminated under Regulation 48 (a). The said Regulations also provided for dismissal of an employee who was found guilty of misconduct a disciplinary inquiry held according to the procedure prescribed in the said Regulations. In Muley's case learned single Judge of the Bombay High Court, Sawant, J., held the said Regulation 48 (a) to be void as infringing Article 14 of the Constitution. In West Bengal State Electricity Board case (AIR 1985 SC 722) this Court stated (at page 119) (of SCC) "The learned Judge struck down Regulation 48 (a) and we agree with his reasoning and conclusion." The reasoning upon which Sawant, J., reached his conclusion was that there was no guidance given anywhere in the impugned Regulation for the exercise of the power conferred by it, that it placed untrammelled power in the authorities, that it was an arbitrary power which was conferred and did not make any difference that it was to be exercised by high ranking officials. In the Makalu case (1983 Lab IC 350) contrary view was taken by a Division Bench of the Bombay High Court. The Division Bench rightly held that the employees of a statutory corporation did not enjoy the protection conferred by Article 311 (2). It however, further held that the phrase "without assigning any reason" used in the said Regulation 48 only meant a disclosure of the reason



**D. P. Madou**  
**Judge**  
**Supreme Court of India**

the employee concerned. After going through the facts which had been pleaded by Air India International to justify the termination of service of the petitioner in the case, the Division Bench held that the impugned order was justified. It further held that Regulation 48 was not a one-sided regulation. Under Regulation 49 the employee was also permitted to resign without assigning any reason by giving the reason prescribed therein. The Division Bench applied to the said Regulation the analogy of the ordinary law of master and servant under which no servant can claim any security of tenure. It also brought in it the analogy of the power to compulsorily retire an employee under a provision in that behalf is made in the Service Rules. The Division Bench further held that it was difficult to conceive of any authority, which is "the State" under Article 12 of the Constitution, which can terminate the services of its employees without reason or arbitrariness.

It further held that the existence of relevant reasons was a sine qua non for exercising the power under Regulation 48. It went on to hold that because of the complexity of modern administration and the unpredictable exigencies which may arise in the course thereof, it was necessary that an employer should be vested with powers such as those conferred by Regulation 48. The Division Bench took great pains to discern in some of the sections of the Air Corpora-

tions Act guidelines for the exercise of the power conferred by Regulation 48. According to the Division Bench, the choice of Air India International to proceed under Regulation 48 would have to be dictated for the purpose of the needs and exigencies of its administration and if that power was exercised arbitrarily, the Court would strike down the action taken under Regulation 48.

110. We have invited by learned counsel for the Appellants to peruse the judgement in that case and we did so with increasing astonishment. Though the said judgement bears the date September 18, 1981, we were unable to make out whether it was a judgement given in the year 1981 or in the year 1881 or even earlier. We find ourselves wholly unable to agree with the view taken by the Division Bench. Apart from the factual aspects of the case, as to which we say nothing, we find every single conclusion reached by the Division Bench and the reasons given in support thereof to be wholly erroneous. The Division Bench overlooked that it was not dealing with a case of a non-speaking order but with the validity of a regulation. The meaning given by it to the expression "without assigning any reason" was wrong and untenable. Starting with this wrong premise, it has gone from one wrong premise to another. In the light of what we have said earlier about the principles of public policy evolved, and tested by the principle which we have



formulated, the said Regulation 48 (a) could never have been sustained. In West Bengal State Electricity Board's case, a three-Judge Bench of this Court said as follows:

"The learned counsel for the appellant relied upon *Manohar P. Kharkhar v. Raghuraj* (1983 Lab IC 350) (Bom) to contend that Regulation 48 of the Air India Employees' Service Regulations was valid. It is difficult to agree with the reasoning of the Delhi High Court that because of the complexities of Modern administration and the unrepresentable exigencies arising in the course of such administration it is necessary for an employer to be vested with such powers as those under Regulation 48. We prefer the reasoning of Sawant, J. of the Bombay High Court and that of the Calcutta High Court in the judgement under appeal to the reasoning of the Delhi High Court."

The mention of the Delhi High Court in the above passage is a slip of the pen for it was the Bombay High Court which decided the case. We are in respectful agreement with what has been stated in the above passage. The *Makalu* case was wrongly decided and requires to be overruled. We are, in however, informed that an appeal against that judgement is pending in this Court and rather than overrule it here, we leave it to the Bench which hears that appeal to reverse it.

111. We would like to observe here that as the definition of "the State" in Article 12 is for the purpo-

ses of both Part III and Part IV of the Constitution, State actions, including actions of the instrumentalities and agencies of the State, must not only be in conformity with the Fundamental Rights guaranteed by Part III but must also be in accordance with the Directive Principles of State Policy prescribed by Part IV. Clause (a) of Article 39 provides that the State shall, in particular, direct its policy towards "securing that the citizens, men and women equally have the right to adequate means of livelihood." Article 41 requires the State, within the limits economic capacity and development, to "make effective provision for securing the right to work." An adequate means of livelihood cannot be secured to the citizens by taking away without any reason the means of livelihood. The mode of making "effective provision for securing the right to work" cannot be by giving employment to a person and then without any reason throwing him out of employment. The action of an instrumentality or agency of the State, if it frames a service rule such as clause (a) of Rule 9 or a rule analogous thereto would therefore, not only be violative of Article 14 but would also be contrary to the Directive Principles of State Policy contained in clause (a) of Art. 39 and in Article 41.

112. The Calcutta High Court was, therefore, right in quashing the impugned order dated February 26, 1983, terminating the services of the contesting Respondents and directing



Corporation to reinstate them to pay them all arrears of salary. High Court was, however, not in declaring clause (i) of Rule 9 as entirely as ultra vires Art. 14 of Constitution and in striking down being void the whole of that clause. When the Calcutta High Court overruled was that Rule 9 also confers on a permanent employee the right to resign from the service of the Corporation. By entering into a contract of employment a person does not enter into a bond of slavery and a permanent employee cannot be deprived of his right to resign. A resignation by an employee would, however, normally require to be accepted by the employer in order to be effective. It can be said that in certain circumstances an employer would be justified in refusing to accept the employee's resignation for instance, when an employee attempts to leave in the middle of a work which is urgent or important and for the completion of which his presence and participation are necessary. An employer can also refuse to accept the resignation when there is a disciplinary inquiry pending against the employee. In such a case, to permit an employee to resign would be to allow him to go away from the service and escape the consequences of an adverse finding against him in such an inquiry. There may also be other ground on which an employer would be justified in not accepting the resignation of an employee. The Corporation ought to make suitable provisions in that behalf in

the said Rules. Therefore, while the judgement of the High Court requires to be confirmed, the declaration given by it requires to be suitably modified.

113. In the result, both these Appeals fail and are dismissed substituting for the declaration given by it a declaration that clause (i) of Rule 9 of the "Service, Discipline and Appeal Rules 1979" of the Central Inland Water Transport Corporation Limited is void under S. 23 of the Contract Act, 1872, as being opposed to public policy and is also ultra vires Art. 14 of the Constitution to the extent that it confers upon the Corporation the right to terminate the employment of a permanent employee by giving him three months' notice in writing or by paying him the equivalent of three months' basic pay dearness allowance in lieu of such notice.

114. By interim orders passed in the Petitions for Special Leave to Appeal filed by the Corporation, we had granted pending the disposal of these Petitions a stay of the order of the Calcutta High Court in so far as it directed the reinstatement of the contesting Respondents. At that stage the Corporation had undertaken to pay to the said Respondents all arrears of salary and had also undertaken to pay thereafter their salary from month to month before the tenth day of each succeeding month until the disposal of the said Petitions. We hereby vacate the stay order of reinstatement passed by us and direct the Corporation forthwith to reinstate the First Respondent in each of these Appeal and to pay to



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**D. P. Madon**

**Judge**

**Supreme Court of India**

him within six weeks from today all arrears of salary and allowances payable to him, if any still remain unpaid.

115. The First Appellant in both these Appeals, namely, the Central Inland Water Transport Corporation Limi-

ted, will pay to the First Respondent in each of these Appeals the costs of the respective Appeals. The other parties to these Appeals and the Intervener will bear and pay their own costs of the Appeals.

Appeals dismissed.



## OBSERVATION

(A) **U. P. Co-operative Societies Act (11 of 1966). S. 122 (1)—U.P. Co-operative Societies Employees Service Regulations (1975) Regns. 17, 18—Employee of U. P. Co-operative Sugar Factories Federation—Continuing in post after completion of maximum period of probation provided under Regulations—Heads confirmed—His reversion to lower post by treating him on probation—Illegal. Decision of Allahabad High Court, Reversed.**

(B) **U. P. Co-operative Societies Act (11 of 1966), Ss. 122, 121—U. P. Co-operative Societies Employees Service Regulations (1975), Regn. 1. U.P. Co-operative Sugar Factories Federation service Rules (1976), R. 1—Provisions of Service Rules of 1976 do not override service Regulations of 1975—Services of Employee of U. P. Co-operative Sugar Factories Federation are regulated by Service Regulations of 1975.**

## OBSERVED BY

Mr. O. Chinnappa Reddy

and Mr. K. N. Singh

Hon'ble Judges, Supreme Court of India

## IN

Civil Appeal No. 491 of 1985 decided on 9-5-1986 in the case of Om Prakash Mau-Appellant v. U. P. Co-operative Sugar Factories Federation, Lucknow and others, Respondents.

## TEXT

Singh, J.—This appeal is directed against the order of the High Court of Allahabad (Lucknow Bench) dismissing the appellant's writ petition made under Art. 226 of the Constitution challenging the Order dt. 2-9-1983 reverting the appellant from the post of Commercial Officer to that of Superintendent.

2. The appellant joined service in an Sahkari Chini Mills Ltd, Bisalpur District Pilibhit, a sugar factory run and managed by the Uttar Pradesh Co-operative Mills Federation. While the appellant was working as Office Super-

intendent, he was selected for promotion to the post of Commercial Officer and by Order dt. August 29, 1980 appointed on probation for one year against a regular vacancy with a condition that his probationary may be extended further and during the period of probation he could be reverted to the post of Office Superintendent without any notice. On 2-7-1981 the appellant was transferred from Bisalpur to Majohla Sugar Factory where he continued to work as Commercial Officer. By an Order dt. 2-10-1981 the appellant's pro-



bationary period was extended for one year till 4-9-1982, the period so extended expired on 4-9-82 but no further order either extending the probationary period or confirming him on the post was issued, and the appellant continued to work as Commercial Officer. The Managing Director of the U. P. Co-operative Sugar Mill Federation Ltd a "Co-operative society" registered under the U. P. Co-operative Societies Act, 1965, which runs and manages a number of sugar factories in the State of Uttar Pradesh issued order on 2-9-81 (1983?) reverting the appellant to the post of Office Superintendent. The appellant challenged the validity of the reversion order before the High Court on the sole ground that on the expiry of the probationary period he stood confirmed, and he could not be reverted treating him on probation. The High Court held that on the expiry of the probationary period the appellant could not be deemed to be confirmed as there was no rule prohibiting the extension of probationary period.

3. The U. P. Co-operative Institutional Service Board constituted by the State of Uttar Pradesh in accordance with sub-sec. (2) of S. 122 of the U. P. Co-operative Societies Act, 1965 has framed the U. P. Co-operative Societies Employees Service Regulations 1975 which regulate the condition of service of employee of all the co-operative societies placed under the purview of the Institutional Service Board by the Government Notification No. 366-C/XIIC-3 36-71 dt. March 4, 1972. These re-

gulations contain provisions for recruitment, probation, confirmation, seniority and disciplinary control. Regulation 17 provides for probation, it lays down that all persons on appointment against regular vacancies shall be placed on probation for a period of one year. Proviso to the Regulation lays down that the appointing authority may, in individual cases, extend the period of probation in writing for further period not exceeding one year, as it may deem fit. Clause (ii) of the Regulation provides that if, at any time, during or at the end of the period of probation or the extended period of probation, it appears to the appointing authority that the employee placed on probation, has not made sufficient use of the opportunity offered to him, or has otherwise failed to give satisfaction, he may be discharged from service, or reverted to the post held by him substantively, if any, immediately before such appointment. Regulation 18 provides for confirmation of an employee on the satisfactory completion of the probationary period. Regulation 17 and 18 read together, provide that appointment against a regular vacancy is to be made on probation for a period of one year, this probationary period can be extended for a period of one year more. The proviso to Regulation 17 restricts the power of the appointing authority in extending period of probation beyond the period of one year. An employee appointed against a regular vacancy cannot be placed on probation for a period more than two years and if during the period of



**K. N. Singh****Judge****Supreme Court of India**

bation the appointing authority is of opinion that the employee has not made use of opportunity afforded to him he may discharge him from service and revert him to his substantive post. If he has no power to extend the period of probation beyond the period of two years Regulation 18 stipulates confirmation of an employee by an express order on the completion of the probationary period. The regulations do not expressly lay down as to what would be the status of an employee on expiry of maximum period of probation where no order of confirmation is made and the employee is allowed to continue in service. Since Regulation 17 does not permit continuation of an employee on probation for a period more than two years the necessary result would follow that after the expiry of two years probationary period, the employee stands confirmed by implication. This is implicit in the scheme of Regulations 17 and 18. In *State of Punjab v. Dharam Singh*, (1968) 3 SCR 1 Constitution Bench of this Court said:

“Where as in the present case, the service rules fix a certain period of time beyond which the probationary period cannot be extended, and an employee appointed or promoted to a post on probation is allowed to continue in that post after completion of the maximum period of probation without an express order of confirmation, he cannot be deemed to continue in that post as a probationer by implication. The reason is that such an implication

is negated by the service rule forbidding extension of the probationary period beyond the maximum period fixed by it. In such a case, it is permissible to draw the inference that the employee allowed to continue in the post on completion of the maximum period of probation has been confirmed in the post by implication.”

4. In the instant case the order of appointment promoting the appellant on the post of Commercial Officer merely indicated that his probationary period could be extended and he could be reverted to the post of Office Superintendent without any notice. Stipulation for extension of probationary period in the appointment order must be considered in accordance with the proviso to Regulation 17 (1) which means that the probationary period could be extended for a period of one year more. Undisputably on the expiry of the appellant's initial probationary period of one year, the appointing authority extended the same for another period of one year which also expired on 4-9-82. During the period of probation appellant's services were neither terminated nor was he reverted to his substantive post instead he was allowed to continue on the post of Commercial Officer. On the expiry of the maximum probationary period of two years, the appellant could not be deemed to continue Probation instead he stood confirmed in the post by implication. The appellant acquired the status of a confirmed employee on the post of Commercial Officer and



the appointing authority could not legally revert him to the lower post of Superintendent.

5. Learned Counsel appearing for the U. P. Co-operative Sugar Factories Federation urged that the U. P. Co-operative Societies Employees Service Regulations 1975 do not apply to the appellant as he was an employee of the U.P. Co-operative Sugar Factories Federation as the condition of service of the appellant and other employees of the U.P. Co-operative Sugar Factories Federation are regulated by the U.P. Co-operative Sugar Factories Federation Service Rules 1976 framed by Cane Commissioner in exercise of his powers under sub-sec. (1) of S. 121 of the Act published in the U.P. Gazette dt. September 4, 1976. Rule 3 of the U.P. Co-operative Sugar Factories Federation Service Rules 1976 (hereinafter referred to as the Federation Service Rules) provides that these Rules shall apply to all the employees of the Federation. Rule 5 provides that every employee shall be appointed on probation for such period as the authority appointing may specify and the period of probation may be extended by the appointing authority from time to time, the rule does not prescribe any limit on the extension of the probationary period. Rule 6 provides that upon satisfactory completion of probationary period an employee shall be eligible for confirmation. Placing reliance on rule 5 learned counsel for the respondents urged that since there was no order of confirmation the appellant's probationary period

stood extended, therefore, he could be reverted at any time to his substantive post. It is true that rule 5 of the Federation Service Rules does not place any restriction on the appointing authority's power to extend the probationary period, it may extend the probationary period for an unlimited period and in the absence of Confirmation Order the employee shall continue to be on probation for indefinite period. It is well settled that where appointment on promotion is made on probation for a specific period and the employee is allowed to continue in the post after expiry of the probationary period without any specific order of confirmation he would be deemed to continue on probation provided the Rules do not provide contrary to it. If Rule 5 applies to the appellant he could not acquire the status of a confirmed employee in the post of Commercial Officer and he could legally be reverted to his substantive post.

6. There are two sets of rules : (i) The U.P. Co-operative Societies Employees Service Regulations, 1975, (ii) the U.P. Co-operative Sugar Factories Federation Employees Service Rules 1976. The question is which of rules apply to the employees of the Co-operative Sugar Factories Federation. While considering this question it is necessary to advert to the relevant provisions of the Act and the Rules framed thereunder and the Notifications issued from time to time. Section 121 of the Act confers power on the Registrar, (an officer appointed as such by the State Government under S. 3) to frame regula-



to regulate the emoluments and conditions of service of employees in a Co-operative Society or class of Co-operative Societies, Section 3 (2) confers power on the State Government to appoint officers to assist the Registrar and confer on them all or any of the powers of the Registrar. An officer on whom powers of Registrar are conferred by the State Government, has authority to frame rules regulating condition of service under S. 121 (1) of the Act. Section 122 (1) confers power on the State Government to constitute an authority for the recruitment, training and disciplinary control of the employees of the Co-operative Societies or class of co-operative societies and it may further exercise such authority to frame regulations regarding recruitment, emoluments, terms and conditions of service including disciplinary control of such employees. Regulations so framed require approval of the State Government under sub-sec. (2). Once approval is obtained, the regulations take effect from the date of publication. The State Government in exercise of its powers under S. 122 (1) issued a Notification No. C/XIIC-3-36-71, dt. March 4, 1972 constituting the U. P. Co-operative Institutional Service Board as an authority for the recruitment, training and disciplinary control of the employees of the Apex Level Societies, Central or Primary Societies, and it further conferred power on the Institutional Service Board to frame regulations regarding recruitment, emoluments, terms and conditions of service of the employees of the

co-operative societies of the Apex Level Societies, Central or Primary Societies. In pursuance thereof the Institutional Service Board framed the U. P. Co-operative Societies Employees Service Regulations 1975 regulating the conditions of service of the employees of these Co-operative Societies which were placed under the purview of the Institutional Board by the Government Notification No. 336-C/XIII. C-3-36-71, dt. March 4, 1972. This Notification states that the Board shall have authority to frame regulations for the recruitment, training and disciplinary control of the employees of the Apex Level Societies, Central or Primary Societies Section 2 (a-4) which defines "Apex Level Societies", expressly specifies the U. P. Co-operative Sugar Factories Federation Ltd. as an Apex Level Society. Since the Institutional Service Board was conferred power to frame regulations regulating the conditions of service of the employees of Apex Level Societies, the regulations framed by the Board apply to the employees of the U. P. Co-operative Sugar Factories Federation Ltd. The respondents have failed to place any Notification before the Court to show that the power of the Institutional Service Board to frame regulations, regulating the conditions of service of the employees of Apex Level Societies including that of U. P. Co-operative Sugar Factories Federation Ltd. was ever withdrawn.

7. The U. P. Co-operative Sugar Factories Federation Service Rules 1976 have been framed by the Cane



Commissioner under sub-sec (1) of S. 122 of the Act. These Rules provide that they shall apply to all the employees of the U. P. Co-operative Sugar Factories Federation Ltd., but the question is whether rules so framed by the Cane Commissioner would override the Service Regulations 1975. As noted earlier, the Institutional Service Board was constituted an authority under S. 122 (1) of the Act and authorised to frame regulations regulating the conditions of service of employees of the Co-operative Societies including those of Apex Level Societies. Sub-section (2) of S. 122 provides that on approval of the Regulations by the State Government any rule or regulations framed by the Registrar in exercise of its powers under S. 121 (1) would stand superseded. Sub-section (1) of S. 121 confers power on the Registrar which may include any other subordinate officer or authority to frame rules regulating the condition of service of employees of Co-operative Societies, such rules do not require approval of the State Government. While a regulation framed by an authority constituted under sub-sec. (1) of S. 122 requires approval of the State Government and on such approval the regulation so framed supersedes any rules made under S. 121. The scheme of S. 121. The scheme of S. 121 and S. 122 postulates that primacy has to be given to regulations framed by the authority under S. 122 of the Act. If there are two sets of rules regulating the conditions of service of employees of co-operative societies the regulation framed under S. 122 and approved by the State

Government shall prevail. In this view the provisions of the U. P. Co-operative Sugar Factories Federation Service Rules 1976 do not override Service Regulations of 1975. It appears that this position was realised by the State Government and for that reason it issued Notification No. U. O. 402 (II) C-I-7 dt. August 6, 1977 constituting the Commissioner and Secretary Sugar Industry and Cane Development Department as authority under sub-sec. (1) of S. 122 for the recruitment, training and disciplinary control of employees of the U. P. Co-operative Factories Federation Ltd.

8. The learned counsel for the respondent urged that since the Government had constituted the Commissioner and Secretary of the Cane Development Department as the competent authority for framing regulations for the recruitment, training and disciplinary control of the employees of the U. P. Co-operative Sugar Factories Federation Ltd. 1975 Regulations framed by the Institutional Service Board do not apply. We find no merit in this submission. Firstly, the Notification dt. August 6, 1977 merely designates the Commissioner and Secretary Sugar Industry and cane Development Department as the authority for the recruitment, training and disciplinary control of the employees of the U. P. Co-operative Sugar Factories Federation, it does not confer power on the authority to frame any rules or regulations regulating the conditions of service of the employees of the Sugar Factories Federation Ltd. But even



**K. N. Singh**

**Judge**

**Supreme Court of India**

any such power can be inferred, admittedly no rules or regulations regulating conditions of service of the employees of the Co-operative Sugar Factories Federation have as yet been framed. Learned counsel for the respondents conceded that draft service regulations have been prepared but those have not been approved by the Government as required by sub-sec (2) of the Act. In absence of approval of the State Government as required by sub-sec. (2) of S. 17, regulations, if any, framed by the Commissioner and Secretary Sugar Industry and Cane Development Department cannot acquire any legal force. In this view 1975 Regulations framed by the Constitutional Service Board continue to apply to the employees of the U. P. Co-operative Sugar Factories Federation Ltd.

9. In view of the above discussion

it is manifestly clear that the appellant services were regulated by the U. P. Co-operative Societies Employees Service Regulations, 1975. Since under those regulations appellants probationary period could not be extended beyond the maximum period of two years, he stood confirmed on the expiry of maximum probationary period and thereafter he could not be reverted to a lower post treating him on probation. The order of reversion is illegal. We accordingly allow the Appeal, set aside the order of the High Court and quash the order of reversion dt. 2-9-1983 and direct that the appellant shall be treated in service and paid his wages and other allowances. The appellant is entitled to his costs which is quantified as Rs. 1,000/-.

**Appeal allowed.**



IT IS THE ESSENCE OF DEMOCRACY  
TO OBEY  
NO MASTER BUT THE LAW



## OBSERVATION

**Direct recruitment—Age limit for candidates specified—Determination of age of candidate Mode—Candidate attains the specified age not on the anniversary of his birthday but on day preceding the anniversary of his birth day Constitution of India, Art. 309—Rajasthan State and Subordinate (Direct Recruitment by Competitive Examination) Rules (1962), R. 11B.**

## OBSERVED BY

Mr. A. P. Sen and

Mr. B. C. Ray

Hon'ble Judges, Supreme Court of India

## IN

Civil Appeal No. 531 of 1986 (In S. L. P. No. 12608/85), decided on 28-8-1986 in the case of Prabhu Dayal Sesma, Appellant v. State of Rajasthan and another, Respondents.

## TEXT

A. P. Sen, J. :— The short point involved in this appeal by special leave petitioners is to the determination of age at a particular point of time. The question is whether the appellant having his date of birth as January 2, 1956 had attained the age of 28 years on January 1, 1984 and was therefore disqualified from being considered for direct recruitment to the Rajasthan Administrative Service under R. 11B of the Rajasthan State and Subordinate Service (Direct Recruitment by Competitive Examination) Rules, 1962 (for short 'the Rules').

2. Put very briefly, the essential facts are these. The Rajasthan Public Service Commission invited applications for direct recruitment to the Rajasthan

Administrative Service and allied services of the Government of Rajasthan by a competitive examination to be held in 1983. Under the directions issued by the Commission, the minimum age prescribed for candidates was 21 years and the maximum 28 years. It was prescribed that the candidate should have attained the age of 21 years on January 1, 1984 and should not have attained the age of 28 years i. e. on the first day of January next following the last date fixed for receipt of application. The appellant was allowed to appear in the written examination, but by an order dated June 12, 1984, the Assistant Secretary to the Commission intimated the appellant that his candidature was rejected on the ground that he had attained the age of 28 years



on January 1, 1984 and was therefore ineligible for consideration. Feeling aggrieved, the appellant moved the High Court under Art. 226 of the Constitution and contended that his date of birth was January 2, 1956 and that he had not attained the age of 28 years on January 1, 1984. His claim was contested by the respondents who pleaded that the appellant had attained the age of 28 years on January 1, 1984 and therefore his form was properly rejected. During the pendency of the writ petition, the High Court by an interim order dated September 14, 1984 directed the Commission to interview the appellant if he was otherwise eligible for being considered except on the ground of age. The appellant was accordingly interviewed but the result was withheld. A learned single Judge by his judgement and order dated January 19, 1985 held that if the date of birth of the appellant was January 2, 1956 he would complete the age of 28 years only at the end of the day of January 1, 1984 and therefore he could not be said to have attained the age of 28 years on that date. He accordingly held that the Commission was not justified in rejecting the candidature of the appellant on the ground that he had attained the age of 28 years on January 1, 1984 and therefore was not eligible for consideration.

3. On appeal, a Division Bench disagreed with the view expressed by the learned Single Judge and reversed his judgement on the ground that the words used in R. 11-B of the Rules are, 'must not have attained the age of 28 years on the first day of January next following

the last date fixed for receipt of application' and not that he should have completed the age of 28 years on that date. They relied upon the undisputed fact that the first day of January next following the last date fixed for receipt of application in this case was January 1, 1984. Accordingly, they held that the appellant was born on January 2, 1956 and, such as he had attained the age of 28 years as soon as the first day of January 1984 commenced. They further held that the appellant had not only attained the age of 28 years, but had also completed the same at 12 O' clock in the midnight of January 1, 1984. According to the learned Judges, on January 2, 1984, the appellant would be one day more than 28 years and, as such, he was disqualified to appear at the examination under R. 11-B of the Rules. The conclusion of the learned Judges may best be stated in the appellant's own words :

"In calculating a person's age, the day of his birth must be counted as a whole day and he attains the specific age on the day preceding, the anniversary of his birth-day."

4. In coming to that conclusion the learned Judges relied upon the language of R. 11-B of the Rules which prescribes the age limit for the said examination and also referred to S. 4 of the Indian Majority Act, 1875. They have relied on certain decisions of different High Courts, particularly that in *G. Vatsala Rani v. Selection Committee for Admission to Medical Colleges, Bangalore*, AIR 1967 Mys 135 and to some English decisions



g down the principle for determination of age.

5. It is argued that the learned judges were in error in introducing the concept of the age of majority as down in S. 4 of the Indian Majority Act, 1875 for the purpose of interpreting R. 11B. It is said that the purpose of R. 11B framed by the Government was to prescribe the maximum and minimum age limits for entry into the Indian Administrative Service and other services of the Government of India. It is submitted that as commonly understood, a person attains a particular age after he has completed a certain number of years. It is said that there is no reason why the words of R. 11B 'must have attained the age of 21 years and must not have attained the age of 28 years' should not be understood in the ordinary sense. At first sight, the contention advanced appears to be rather attractive but on deeper consideration it cannot prevail.

6. Learned counsel for the appellant drew our attention to the fact that the Union Public Service Commission has been interpreting the words 'must have attained the age of 21 years and must not have attained the age of 26 years on the first day of August next following' in the way the appellant contends for. These words are taken from R. 4 of the Indian Administrative Service (Appointment by Competitive Examination) Regulations, 1955 framed by the Central Government in pursua-

nance of R. 7 of the Indian Administrative Service (Recruitment) Rules, 1954. presumably, there would be similar provisions laying down the qualification as to age in other central services as well as R. 4 insofar as material reads :

"4. Conditions of Eligibility—

In order to be eligible to compete at the examination, a candidate must satisfy the following conditions, namely :

(i) x x x x x

(ii) Age—He must have attained the age of 21, and not attained the age of 28 on the first day of August of the year in which the examination is held : Provided that the upper age limit may be relaxed in respect of such categories of persons as may from time to time, be notified in this behalf by the Central Government, to the extent and subject to the conditions notified in respect of each category."

7. Undoubtedly, the Union Public Service Commission, has been interpreting the provision as to attainment of age in a like manner. This would be clear from the advertisement issued by it on December 8, 1984 which is in these terms :

"Age limit : (Ka). The candidate should have attained the age of 21 years on 1st August, 1985 but should not have attained the age of 26 years, that is, he should not have been born before the 2nd August, 1959 and after the 1st August, 1964".

We are afraid, the interpretation of R. 11B of the Rules cannot proceed



upon the basis adopted by the Union Public Service Commission.

Rule 11B of the Rules provides :

“11-B, Age. Notwithstanding anything contained regarding age limit in any of the service Rules governing through the agency of the commission to the posts in the State Service and in the Subordinate Service mentioned in Schedule I and in Schedule II respectively, a candidate for direct recruitment to the posts to be filled in by combined competitive examinations conducted by the Commission under these Rules must have attained the age of 21 years and must not have attained the age of 28 years on the first day of January next following the last date fixed for receipt of application.”

8. It is plain upon the language of R. 11B that a candidate ‘must have attained the age of 21 years and must not have attained the age of 28 years on the first day of January next following the last date fixed for receipt of application’. Last day fixed for receipt of application in this case, was January 1, 1983. First day of January next following that day would be January 1, 1984. The object and intent in making R. 11B was to prescribe the age limits upon which the eligibility of a candidate for direct recruitment to the Rajasthan Administrative Service and other allied services is governed. At first impression, it may seem that person born on January 2, 1956 would attain 28 years of age only on January 2, 1984 and not on January 1,

1984. But this is not quite accurate. In calculating a person’s age, the day of birth must be counted as a whole day and he attains the specified age on the day preceding, the anniversary of his birth day. We have to apply well accepted rules for computation of time. One such rule is that fractions of a day will be omitted in computing a period of time in years or months in the sense that a fraction of a day will be treated as a full day. A legal day commences at 12 O’clock midnight and continues until the same hour the following night. There is a popular misconception that a person does attain a particular age unless and until he has completed a given number of years. In the absence of any express provision, it is well-settled that any specified age in law is to be computed as having been attained on the day preceding the anniversary of the birth day.

9. In Halsbury’s Laws of England 3rd edn. Vol. 37, para 178 at p. 100, the law was stated thus :

“In computing a period of time, at any rate, when counted in years or months, no regard is generally paid to fractions of a day, in the sense that the period is regarded as complete although it is short to the extent of a fraction of a day.....

“Similarly, in calculating a person’s age the day of his birth counts as a whole day : and he attains a specified age on the day next before the anniversary of his birth day.”



10. We have come across two English decisions on the point. In *Rex v. ...*, (1930) I. K.B. 741 the question was whether the accused had or had not completed 21 years of age. S. 10 (1) of the Criminal Justice Administration Act, 1930 provides that a person might be sent to prison if it appears to the Court that he is not more than 21 years of age. The accused was born on February 17, 1909. Lord Hewart, C. J. held that the accused had completed 21 years of age on February 17, 1930 and that he was one day more than 21 years of age on February 17, 1930. This was the Commission day of Quarter Sessions Assizes.

11. In *Re, Shurey v. Shurey* (1918) 1 K.B. 63 the question that arose for decision was this: Does a person attain a specified age in law on the anniversary of his birthday, or on the day preceding the anniversary? After reviewing the earlier decisions, Sargant, J. said that law does not take cognizance of part of day and the consequence is that person attains the age of twenty-one years or of twenty-five years, or any specified age, on the day preceding the anniversary of his twenty-first or twenty-fifth birthday or his birthday, as the case may be.

12. From Halsbury's Laws of England, 4th edn., Vol. 45 para 1143 at p. 550 it appears that S. 9 of the Family Law Reform Act, 1969 has abrogated the old common law rule stated in *re. Shurey, Shurey v. Shurey* (supra).

13. It is in recognition of the difference between how a person's age is legally construed and how it is under-

stood in common parlance. The Legislature has expressly provided in S. 4 of the Indian Majority Act, 1875 that how the age of majority is to be computed. It reads:

“4. Age of majority how computed—

In computing the age of any person, the day on which he was born is to be included as a whole day, and he shall be deemed to have attained majority, if he falls within the first paragraph of S. 3, at the beginning of the twenty-first anniversary of that day, and if he falls within the second paragraph of S. 3, at the beginning of the 18th anniversary of that day.”

The Section embodies that in computing the age of any person, the day on which he was born is to be included as a whole day and he must be deemed to have attained majority at the beginning of the eighteenth anniversary of that day. As already stated, a legal day commences at 12 O' clock midnight and continues until the same hour the following night. It would therefore appear that the appellant having been born on January 2, 1956, he had not only attained the age of 28 years but also completed the same at 12 O' clock on the midnight of January 1, 1984. On the next day i. e. on January 2, 1984, the appellant would be one day more than 28 years. The learned Judges were therefore right in holding that the appellant was disqualified for direct recruitment to the Rajasthan Administrative Service and as such was not entitled to appear at the examination held by the Rajasthan Public Service



Commission in 1983. We affirm the view taken by the learned Judges as also the decision in *G. Vatsala Rani's case*, (AIR 1967 Mys 135), (*supra*).

14. Before parting with the case we shall be failing in our duty if we do not advert to the undue hardship caused to the appellant. The appellant had not only qualified at the written examination held by the Rajasthan Public Service Commission but was also called for an interview under the directions of the High Court. In case he cleared the interview, it would imply that the appellant would fail to secure entry into the Rajasthan Administrative Service just by one day because of the interpretation placed on R. 11B of the Rajasthan State and Subordinate Services (Direct Recruitment

by Competitive Examination) Rule 1962. We wish the Government would consider the question of relaxing the upper age limit in the case of appellants in order to mitigate the hardship, if otherwise permissible. There is need for provision like the proviso to R. 4 of the Indian Administrative Service (Appointment by Competitive Examination) Regulations, 1955, conferring the power of relaxation on the State Government under certain conditions without which a candidate though deserved would be ineligible for appointment.

15. The result is that the appeal must fail and is accordingly dismissed. There shall be no order as to costs.

Appeal dismissed



V. Khalid

Judge

Supreme Court of India

## OBSERVATION

**Contempt of Courts—Mere impression of a view or suggestion in noting does not come within the view of contempt of court—Expression of a view is only a part of the thinking process preceding governmental action.**

## OBSERVED BY

Mr. V. Khalid and

Mr. G. L. Oza

Hon'ble Judges, Supreme Court of India

## IN

Civil Appeal No. 871 of 1986 etc. decided on 28th April, 1987 in the case of State of Bihar and others, Appellants v. Kirpalu Shankar and others, Respondents.

## TEXT

V. Khalid, J.—These appeals are filed against the Judgement of a Division Bench of Patna High Court in S.C. case No. 356 of 1985. Appeal No. 871 of 1986 is by the State of Bihar, and Appeal No. 916 jointly by Srideo Mishra, District Commissioner, Ranchi (at the relevant time, Secretary-cum-Legal Remunerator, Department of Law, Government of Bihar, Patna) and Mrs. Radha Kishor, Commissioner, Ranchi Division, Ranchi (at the relevant time Additional District Commissioner, Patna), Appeal No. 933 by Subh Chandra Jha, Public Relation Officer, Irrigation Department, Government of Bihar, Patna and Appeal No. 1178 by Birkeshwar prasad Singh, Professor and Head of Department of Physical Science, Magadh University, Patna, Bihar Public Service Commission, Patna at the relevant time). The appellants have been convicted by the

High Court for contempt of its order and have been sentenced to a fine of Rs. 50/- in default to suffer simple imprisonment for two weeks. The High Court had issued contempt notice against some others also. Those notices were discharged against them.

2. The background facts necessary can be now stated in brief as follows :—

In the Irrigation Department of the State of Bihar, there existed a post of Public Officer. This post became vacant some time in 1979. One Arun Kumar Verma was appointed to that post for six months. At that time one Kripalu Shanker was discharging the functions of Public Relation Officer. He laid claim to that post. He did not succeed. The Secretary to the Department did not accede to his request. Therefore, he filed C. W. J. C. No. 3632 of 1979. When the case came up for



hearing, it was represented on behalf of the State that Shri Verma was appointed only on ad hoc basis for a period of six months and that after the expiry of six months, the matter would be referred to the Public Service Commission for consideration and at that stage the case of Kripalu Shankar also will be considered. It is submitted that on this assurance by the State, the petition was allowed to be withdrawn as per order dated 10-12-1979. It appears that this assurance was not respected, no reference was made to the Public Service Commission for regular appointment and the matter was kept in abeyance for a long time. It is stated that in April, 1983, by which time Dr. Jagannath Mishra had become Chief Minister the State Government appointed Subh Chandra Jha as P. R. O. again on ad hoc basis. This gave rise to the filing of petition no. 1534 of 1983 which was disposed of on 4-5-83. It was contended that this appointment was made without any advertisement and without consultation with the Public Service Commission. The learned Advocate General informed the Court when the matter came up for hearing that the appointment of Jha was only ad hoc giving an impression that regular appointment would be made after the expiry of six months. On this representation the following order was passed by the Court :

“In the circumstances we direct that the post of Public Relations Officer in the Irrigation

Department on which respondent 3 has been appointed on ad hoc basis should be filled up in a regular way. In case the appointment is not made within the period of six months the ad hoc appointment shall stand terminated. We further direct that the fact that the respondent No. 3 has worked on the post on ad hoc basis will not be taken to be a qualification for the purpose of any appointment through regular method on the post of Public Relations Officer.”

3. The six months' period, according to the above order, was to expire on 17-10-1983. The case of the State is that the Irrigation Department had as early as 4-4-1983 written to the Public Service Commission to give concurrence to the appointment of Shri Jha, since his post was an ex-cadre post and since he was selected by a Selection Committee Concurrence was given on 2-4-85. The Government thereafter examined the matter in consultation with the Personnel (Administrative) Reforms Department, with reference to the provisions of the Rules governing reservations. The Government took a decision to send a requisition to the Bihar Public Service Commission for advertising the post. The Commission finally advertised the post on 12-5-1985, setting out the eligibility and criterion for selection.



Another Writ Petition was filed in High Court as C.W.J.C. 2354/85. The allegations that the advertisement was specially drafted to suit only Chandra Jha. The matter was for admission on 13-6-1985. During the hearing of this petition the High Court felt on going through the records that the notes file summoned for production by the Court that its direction in C.W.J.C. No. 1534/83 was disobeyed and, therefore, rule was issued directing the respondents to show cause why they should not be punished for contempt of the Court for ignoring its order dated 4-5-1983, in the above mentioned writ petition.

The State of Bihar and the Irrigation Commissioner-cum-Secretary, Irrigation Department who were respondent Nos. 1 and 2 before the High Court expressed their regret but at the same time contended that no contempt had been committed against them for the reason that expression of regret shows the noting made on the files whether they were right or wrong did not amount to contempt of court and no order was passed appointing Chandra Jha after 17-10-1983 to take any contempt action. The third respondent also pleaded similarly and expressed regret for any omission on his part. The Bihar Service Commission and its Executive Officer stated that they have not committed any contempt, that Subh Chandra Jha's appointment, from 18-10-1983 should be treated as a fresh appointment, that they

did not know about the order passed in petition no. 1534 of 1983, that though concurrence was given, it was withdrawn when the correct facts were made known to them and that the withdrawal of the concurrence was duly communicated. The other respondents also adopted similar stand in the returns filed by the end.

5. Arguments in the contempt matter were heard for some time, and they were concluded on 12-8-1985 and the case was posted for Judgement. The Court went through the Government files and the files of the Bihar Public Service Commission. From the noting in the file, the High Court discovered that Mrs. Radha Singh, the then Additional Irrigation Commissioner and Birkeshwar Prasad Singh, Member, Bihar Public Service Commission and Sanjeevan Sharma, Section Officer, Bihar Public Service Commission, had also a part in the matter. Notices were, therefore, directed to be issued to them as well. They appeared and were heard on 25-9-1985.

7. The High Court considered the question of contempt on the following facts, which according to it were undisputed;

- (i) The ad hoc appointment of S. C. Jha must be terminated on 17-10-1983 as per its order.
- (ii) He was still working as P.R. O. with the acquiescence of the



concerned officers.

(iii) Concurrence of the Public Service Commission was sought for his fresh ad hoc appointment.

(iv) The Public Service Commission gave concurrence to the ad hoc appointment from October, 1983, by its order in May, 1985.

8. The High Court expressed itself, of what it felt about the disobedience of its order in para 4 of the Judgement as follows :

“The State Government has ignored the order of the High Court. It had, therefore, to be made party. The Irrigation Commissioner-cum-Secretary is responsible for every act of his Department. It was, therefore, but natural that the proceeding should be drawn up against him also. Shrideo Mishra, Legal Remembrancer was proceeded against, as he advised the State Government on 10-10-1983 to seek concurrence from the Commission in the fresh ad hoc appointment of Subh Chandra Jha knowing full well the dictate of this Court that services of Subh Chandra Jha must be terminated after the expiry of six months. Incidentally, it may be stated once again that the six months period had expired

on 17-10-1983. The Public Service Commission and the Special Executive Officer there of have been proceeded against for granting concurrence to the Ad hoc appointment of Subh Chandra Jha. Subh Chandra Jha himself has been proceeded against for masterminding the whole affair. Proceeding is against him too on that score. The proceeding was initiated against A. U. Sharma on footing that he was the Irrigation Commissioner in October, 1983 when the service of Subh Chandra Jha had to be terminated. That is how the contemnors have been proceeded against.”

9. The High Court found the officers guilty for the reasons given below in Paragraph 22 of the Judgement, which we read so that the approach of the High Court could be properly appreciated.

“It is necessary to consider the submission urged by learned Advocate-General on behalf of the officers of the State and the public service commission. The General submission was, that notings did not represent the concluded decision of the Government, and therefore, the officers were not liable for contempt of court. The proposition advanced by learned Advocate-General is rather too wide. A Govern-



ment file is not an individuals private property. It is public property. The opinions expressed therein are liable to reduce the credibility and the binding nature of the orders passed by the High Court, and that would amount to denigration of the State Judiciary. No officer has the right to abuse the High Court or to ignore the orders passed by the High Court. I do not for a moment contend that for every noting in the file contrary to the view taken by the High Court will amount to contempt of court. It will depend upon the nature of the view noted in the file and whether the notings are intended to set the High Court's Order at naught maliciously. In the present case, the Order of the High Court was explicit. The Advocate General had advised explicitly that taking any steps to appoint Subh Chandra Jha ad hoc would amount to contempt of court and yet the officers were busy trying to find out how to ignore the High Court order. When the High Court's direction was to make the regular appointment through the B. P. S. C. where was the occasion for seeking concurrence of ad hoc appointment of Subh Chandra Jha. The whole file gives the impression that the officers in the state were not

reconciled to the orders passed by the High Court. I am, therefore, unable to hold that some of the officers were not liable for contempt of court.

10. After considering the factual matrix before the Court, the Court held that there was no disobedience of its order by the Government and that the Government had taken a decision not continue the ad hoc appointment but observed as follows :

“The State of Bihar as a juristic person has certainly not committed contempt. Because their Chief Minister Shri Chandreshwar Singh wrote on 8-1-1984 that the High Court order must be obeyed. On 10-3-1984, the Chief Secretary noted that Shri Jha should not be granted ad hoc appointment.....the State of Bihar therefore cannot be held to be guilty of contempt of this Hon'ble Court...”.

11. After this finding, the High Court held some of the officers of the Government guilty solely on the basis of the views expressed by them in the files, which were not, in fact, accepted by the Government and which were only at the stage of suggestions and views. Shri K. K. Venugopal, the learned counsel for the State contended that it would be unsafe to initiate action in contempt merely on the strength of notings by officials on the files, expressing their views and to do so would imperil the working of various departments in a Government in a democracy and would



have far reaching consequences. Sometimes a view expressed by an officer may be incorrect. The view so expressed passes through various hands and gets translated into action only at the ultimate stage. The views so expressed are only for internal use such views may indicate the line of thinking of a particular officer. Until the views so expressed culminate into an executable order, the question of disobedience of Court's order does not arise. Though the State Government have been found not guilty, the State has filed the appeal to protect its officers from independent and fearless expression of opinion and to see that the order under appeal does not affect the proper functioning of the Government.

12. It can not be disputed that the appeal raises an important question of law bearing upon the proper functioning of a democratic Government. A Government functions by taking decisions on the strength of views and suggestions expressed by the various officers at different levels, ultimately getting finality at the hands of the Minister concerned. Till then, conflicting opinions, views and suggestions would have emanated from various officers at the lower level. There should not be any fetter on the fearless and independent expression of opinions by officers on matters coming before them through the files. This is so even when they consider orders of courts. Officers of the Government are often times confronted with orders of courts, impossible of immediate compliance for various reasons.

They may find it difficult to week submit to such orders. On such occasions they will necessarily have to note the files, the reasons why the order cannot be copied with and also indicate that the courts would not have passed those orders if full facts were placed before them. The expression of opinion by the officers in the internal files are for the use of the department and not for outside exposure or for publicity. To find the officers guilty for expressing their independent opinion, even against orders of courts in deserving cases, would cause impediments in the smooth working and functioning of the Government. These internal notings, in fact, are privileged documents. Notings made by the officers in the files cannot, in our view, be made the basis of contempt action against each such officer who makes the notings. If the ultimate action does not constitute contempt, the intermediary suggestions and views expressed in the notings, which may sometimes even amount ex-facie disobedience of the courts orders, will not amount to contempt of court. These notings are not meant for publication.

13. In our considered view the internal notes file of the Government maintained according to the rules of business, is a privilege document. If the Government claims privilege or quasi-privilege regarding the notes file we will not be justified in rejecting the claims outright. In the case, the notes file was brought to the Court not voluntarily by the Government. It was



moned for by the Court. The Court always look into it. The right of Court to look into any files, can be denied. The contents of the file brought to Court get communicated to the Court because the Court look into it. It would be dangerous and an action for contempt for the expression in the notes file, on the very of unpleasant or unsavoury, on a perusal of the notes file by Court after getting them summoned. It would impair the independent functioning of the civil service essential to democracy. This would cause impediments in the fearless expression of opinion by the officers of the Government. Notings on files differ from officer to officer. It may well be that notes by a particular officer, in same, technically speaking is in disobedience of an order of the Court or may be a violation of such order but a more experienced officer sitting above him will always correct him. To rely upon notings in a file for the purpose of finding contempt, in our view, there would be to put the functioning of Government out of gear. We must be careful against being over sensitive, when we come across objectionable notings by officers sometimes out of ignorance, sometimes out of over zealotry and sometimes out of ignorance of the nuances of the question of law involved.

14. Now, the functioning of Government in a State is governed by Article 166 of the Constitution, which lays down that there shall be a council of

ministers with the Chief Minister at the head, to aid and advise the Governor in the exercise of his functions under the Constitution, in his discretion. Article 166 provides for the conduct of Government business. It is useful to quote this Article :

- “166 (1) All executive action of the Government of a State shall be expressed to be taken in the name of the Governor.
- (2) Orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in rules to be made by the Governor and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Governor.’
- (5) The Governor shall make rules for the more convenient transaction of the business of the Government of the State and for the allocation among Ministers of the said business with respect to which the Governor is by under this Constitution required to act in his discretion.”

15. Article 166 (1) requires that all executive action of the State Government shall be taken in the name of the Governor. This clause relates to cases



the executive action has to be expressed in the shape of a formal order or notification. It prescribes the manner in which an executive action has to be expressed. Noting by an official in the departmental file will not, therefore, come within this Article nor even noting by a Minister. Every executive decision need not be as laid down under Article 166 (1) but when it takes the form of an order it has to comply with Article 166 (1). Article 166 (2) states that orders and other instruments made and executed under Article 166 (1), shall be authenticated in the manner prescribed. While clause (1) relates to the mode of expression, clause (2) lays down the manner in which the order is to be authenticated and clause (3) relates to the making of the rules by the Governor for the more convenient transaction of the business of the Government. A study of this Article, therefore, makes it clear that the notings in a file get culminated into an order affecting the rights of parties only when it reaches the head of the department and is expressed in the name of the Governor, authenticated in the manner provided in Article 166 (2).

16. Viewed in this light, can it be said that what is contained in a notes file can ever be made the basis of an action either in contempt or in defamation, the notings in a notes file do not have behind them the sanction of law as an effective order. It is only on expression of a feeling by the concerned officer on the subject under review. To examine whether contempt is committed or not, what has to be looked into is

the ultimate order. A mere expression of a view in notes file cannot be the basis for action in contempt. Business of a State is not done by a single officer. It involves complicated processes. In a democratic set up it is conducted through the agency of a large number of officers. That being so, the noting by one officer, will not afford a valid ground to initiate action in contempt. We have thus no hesitation to hold that the expression of opinion in notes file at different level by concerned officers will not constitute criminal contempt. It would not, in our view, constitute civil contempt either for the same reason as above since mere expression of a view or suggestion will not bring within the vice of sub-section (c) of Section 2 of the Contempt of Courts Act, 1971, which defines civil contempt. Expression for a view is only a part of the thinking process preceding Government action.

17. In the case of *Bachhittar Singh v. The State of Punjab*, 1962 (supra) (3) SCR 713, a Constitution Bench of this Court had to consider the effect of an order passed by a Minister on a file which order was not communicated. This Court, relying upon Article 166 (1) of the Constitution, held that the order of the Revenue Minister, PEPSU could not amount to an order by the State Government unless it was expressed in the name of Rajpramukh as required by the said Article and was then communicated to the party concerned. This is how this Court dealt with the effect of the noting by a Minister on the file;



**V. Khalid**  
**Judge**  
**Supreme Court of India**

"The question, therefore is whether he did in fact make such an order. Merely writing something on the file does not amount to an order. Before something amounts to an order of the State Government two things are necessary. The order has to be expressed in the name of the Governor as required by clause (1) of Article 166 and then it has to be communicated. As already indicate, on formal order modifying the decision of the Revenue Secretary was ever made. Until such an order is drawn up the State Government cannot, in our opinion, be regarded as bound by what was stated in the file. As long as the matter rested with him the Revenue Minister could well score out his remarks or minutes on the file and write fresh ones."

The Court observed in this Judgment that business of State is complicated one and has necessarily to be conducted through the agency of a large number of official and authorities. Before action is taken by the authority concerned in the name of the Rajprakh which formality is a Constitutional necessity, nothing done would amount to an order creating rights or casting liabilities on third parties. It is possible, observed this Court, that after expressing one opinion about a particular matter at a particular stage a Mini-

ster of Council of Ministers may express quite a different opinion which may be opposed to the earlier opinion. In such cases, which of the two opinions can be regarded as the order of the State Government. It was held that an opinion becomes a decision of the Government only when it must be communicated to the person concerned and that this is the essence of the matter. We seek support from these observations for our purpose that notings in a notes file, not only of officers but even that of a Minister will not constitute an order to affect others unless it is done in accordance with Article 166 (1) and (2) and communicated to the person concerned.

18. In England, absolute privilege is given to statements made by one officer of a State to another and such statements are protected in the context of law of defamation. Section 123 of the Evidence Act deals with privilege. We have already stated that State communications or acts of State in public interest, enjoy privilege and if that be so, disclosure in such communications made to the court will not constitute either contempt or defamation. In any case such internal communications enjoy quasi-privilege and a disclosure in such communications cannot be made the basis of an action in contempt.

19. We have seen how the High Court approached the whole question from paragraph 22 extracted early in the Judgement.

20. It is clear that the High Court



based its conclusions purely on the notings in the file. The High Court felt that the offices of the Government did not like the orders passed by it and this, according to the High Court, was evident from the files before it. The High Court summed up its conclusion as follows in paragraph 24 of the Judgment :

“To sum up, contempt of this Court has been committed by Shri Deo Mishra, Legal Remembrancer, Mrs. Radha Sinha, I.A.S. then working as Additional Commissioner.” Irrigation Department and now working as Additional Finance Commissioner, Dr. Birkeshwar Prasad Singh, Sanjeewa Sharma and Subh Chandra Jha and I convict them accordingly. In regard to sentence, I am clearly of the view that there was motivation for it. The hand of the moving spirit has, however, remained concealed. It appears that the feeling amongst high officers of this state is that the High Court will not punish them for contempt of the High Court, as they are high officers and that all that the High Court will do in case of contempt of court is to give lectures and at times rant at them. To remove this misconception it is essential to impose upon them a fine of Rs. 50 (Rupees fifty) (each on all the five persons mentioned above,

in default to suffer simple imprisonment for two weeks. The rules issued against J. C. Kundra, A. K. M. Nassan, A. Sharma and Arjun Prasad discharged.”

21. We see that the High Court felt that there was an attempt on the part of the officers to disobey its orders. The officers had tendered apology. This was not accepted. We are concerned more than anyone in upholding the dignity and prestige of the High Court, but we have a duty at the same time to lay down the law correctly. We feel that the conviction entered by the High Court purely on the basis of the notes file cannot be justified.

22. The High Court was under the impression that all the officers acted in unison to help the 5th respondent. We now deal with his case separately. He was described by the High Court as the Kingpin of the whole drama and according to the High Court everybody concerned acted for his benefit. There is a very strong suggestion that he would not have achieved what he wanted except with the help of political forces and that there was an unseen hand behind what he achieved. He was found guilty of abetting contempt.

23. According to him he has been made a scape-goat, that his is an unfortunate case of a journalist, appointed as Public Relation Officer on an ad hoc basis for six months as recommended by a selection committee at an interview held along with seven other candidates.



**V. Khalid****Judge****Supreme Court of India**

tes. He joined service after such a  
ction on 18-4-1983. As per the order  
the High Court, the period of six  
nths for making the regular appoint-  
nt to his post was to expire on 17-10-  
83. Long before this date, the Irriga-  
a Department had written to the  
blic Service Commission stating that  
post held by the appellant was an ex-  
re post and that concurrence may be  
orded for his appointment. This was  
internal letter. The Government sent  
quisition to the Public Service Com-  
sion for advertising the post on 10-8-  
84. The Commission ultimately made  
publication on 12-5-1985 stating the  
ibility and criteria for selection. It  
s this publication that promoted the  
g of the writ petition in question in  
ich the order that gave rise to the  
tempt proceeding was passed. Regular  
pointment pursuant to the advertise-  
nt was stayed. The appellant thus  
ntinued at the post.

24. According to him he has not  
regarded the order of the High Court.  
e Bihar Public Service Commission  
ve concurrence for his appointment  
six months. The post of P. R. O.  
ng an ex-cadre post since its creation  
1955, the post could not be filled up  
giving promotion to anyone wor-  
g in the department. It was con-  
uted to interview candidates and to  
commend a suitable person. The appe-  
nt continues to function on the  
length of the orders passed in his  
our and he cannot be held to have  
mmitted contempt of the High Cou-

rt's order. He has stated that he had no  
notice in the writ petition filed by kripalu  
Shankar or the writ petition from which  
the present contempt arise. Though he  
was made a party no notice was ever  
issued to him and no direction was given  
to him by the High Court According to  
him apart from a general observation  
that he abetted in disregarding the order  
of the High Court nothing specific has  
been attributed to him. His unqalified  
apology was also not accepted by the  
High Court. He also relies upon the  
fact that he was not paid salary from  
18-10-1983 to date in re-inforcement of  
his submission that he has not committed  
any contempt.

25. With respect to the learned  
Judges, we find it difficult to agree who-  
lly with them regarding the finding that  
the appellant was guilty of contempt.  
We do not have sufficient materials be-  
fore us to conclude that the appellant  
exercised political clout to further his  
interest in uttar disregard of the orders  
of the Court Although it may be said that  
the conduct of the appellant is in some  
measure suspect, we do not find sufficient  
justification to enter a finding that he is  
guilty of contempt and that he acted in  
uttar disregard of the High Court's  
order. It is useful to remember that  
apart from the notes file, there is no  
independent material before us to hold  
that the appellant had committed con-  
tempt. The Government pleader and  
the Advocate General had clearly ad-  
vised the Govrnment to act in accor-  
dance with the directions given by



the High Court. The minister who is the ultimate authority also acted in obedience to the orders of the High Court. That being so, we find it difficult to agree with the finding that he is guilty of criminal contempt. The High Court felt that his was not a fit case to accept the unqualified apology tendered. However, we find, that on materials placed before us, it is not proved beyond doubt that he had committed contempt. We would, therefore, give him benefit of doubt and purge him of the contempt found against him.

26. We would like to outline the general principle on which confidentiality of State documents should be protected. The general principle is that if a person is involved in litigation, the Courts can order him to produce all the documents he has which relate to the issues in the case. Even if they are confidential, the Court can direct them to be produced when the party in possession does not produce them, for the other side to see or at any rate for the Court to see. When the Court directs production of these documents there is an implied understanding that they will not be used for any other purpose. The production of these documents in ordinary cases is imposed with a limitation that the side for whose purpose documents are summoned by the Court cannot use them for any purpose other than the one relating to the case involved.

Miss Harman's case, Home Office

v. Harman-1981 (2) WLR 310, may give some assistance for this aspect of our discussion. The facts are as follows :

Miss Harman, a Solicitor, acted for a criminal. Michael Williams who was in prison serving a long sentence for robbery of the bank. He complained that he was subjected to cruel and unusual punishments while in prison contrary to the Bill of Rights and accordingly brought an action for damages against the Home Office. Miss Harman acted for him as a legal aid counsel. Miss Harman acted for him as a legal aid counsel. Miss Harman got an order for discovery against the Home Office. The Home Office did not raise any objection regarding the production of the documents. However, it objected the use of the documents by the Group, called. "The National Council for Civil Liberties. Accordingly the documents were brought to Court and they were read out in open Court. Miss Harman passed the bundles of the documents to a journalist and a write up appeared in. "The Guardian" which was highly critical of the Home Office. The Home Office took proceedings against Miss Harman for contempt of Court. She was held guilty for contempt by the Court of Appeal and by the House of Lords. In the Court of Appeal, Lord Denning, despite his liberal views, was upholding the right of the Court to read documents relating to case while conceding also the liberty to those



ent in Court to listen when those  
ments were read and the reporter  
ke down that was read, did not ex-  
to the press a right to any further  
of the confidential documents or  
further dissemination of their con-  
s without the consent of the owner.  
of no use to plead the freedom of  
press, he said, that freedom is itself  
ect to restriction, Public confidential,  
as said, should be kept confidential,  
he public interest and should not be  
posed to the ravages of outsiders.  
en the House of Lords' decision in  
man v. Secretary of State for the  
ne Department, 1983 AC 280, up-  
ding the Court of Appeals was rende-  
there was great hue and cry that the  
ng meant 'a black day for press free-  
.....'.

n so, Lord Denning regretted that  
Court ever ordered disclosure of the  
uments and observed that the "legal  
estone will have to be taken up and  
back a bit".

In Bachittar Singh's case (supra),  
velege was claimed regarding the pro-  
tion of which was sought, embodied  
minutes of the meetings of the Coun-  
of Ministers showing the advice which  
Council ultimately give to the Rajpra-  
kh. This Court held that these do-  
ments fell within the category of do-  
ments relating to the affairs of State  
hin the meaning of Section 123 of the  
dence Act and were protected under  
said Section. Though the ratio of  
decision outlines the con-servative  
w in the law relating to privilege, we

are not unmindful of the fact that the  
doctrine of privilege received a shock  
treatment the State at the hands of this  
Court in the judges' case, S. P. Gupta  
and others etc. v. Union of India and  
others etc., 1982 (2) SCR 365. May we  
say that the legal milestone in Gupta's  
case, also needs a retreat, a bit.

27. Before parting with this case  
we would like to observe the need for  
restraint and care in dealing with the  
internal files of the Government. We  
have already indicated its privileged posi-  
tion and limited are as where exposure is  
permissible of the notings in the file.  
This is not say that absolute privilege  
can be claimed of its exposure and pro-  
tection from the view of Courts. But  
what is to be borne in mind is that the  
notings in the departmental files by the  
hierarchy of officials are meant for the  
independent discharge of official duties  
and not for exposure outside. In a de-  
mocracy, it is absolutely necessary that  
its steel frame in the form of civil service  
is permitted to express itself freely unin-  
fluenced by extraneous considerations.  
It might well be that even orders of  
Court come in for adverse remarks by  
officers dealing with them, conformed  
with difficult situations to straight away  
obey such orders. Notings made on  
such occasions are only for the benefit of  
the officers concerned. When a subor-  
dinate official commits a mistake higher  
official will always correct it. It  
is necessary for Courts also to view  
such notings in the proper prespective.  
In this case the Court, after looking into



the notes file could have passed appropriate orders giving relief to the affected party and expressing its displeasure at the manner in which its order was implemented instead of initiating action on the notings made in the file. That way the Court would have enhanced its prestige.

28. It will not serve either the healthy working of civil service, public interest or democratic norms to proceed in contempt against officials solely on the basis of minutes in the internal files, notings which might even be unsavoury or even derogatory to an order of the Court, but which get ultimately corrected by the head of the department, ending with an order under Article 166 (1) and (2) in the name of the Governor in the proper form. We are conscious of the fact that learned judges felt that there was a deliberate attempt to act against their order. We are not unmindful of the indignation

shown by them at the notings in the file. The only reason why we feel constrained to disagree with the High Court's order is our anxiety to delineate the limits of judicial power while dealing with files of the Government and also of the Public Service Commission, a high Constitutional authority. It is necessary to have mutual respect among the various wings of the administration, in the process of disposal of justice.

29. We allow these appeals and discharge the contempt orders passed by the High Court with utmost reluctance in view of the far reaching consequences that would flow if the judgement was allowed to stand. We are happy that appellants have tendered their regret apology to the High Court and have reiterated their regret in this Court also.

Appeal allowed



## OBSERVATION

**Contract Labour (Regulation and Abolition) Act, 1970—Section 10—Catering Cleaners appointed by the Contractors in Southern Railway satisfying all the conditions of section 10(2) to abolish the contract system—Whether required to be abolished—(yes) Appropriate order—Court directed to Central Government to take appropriate action under section 10 prohibiting the employment of contract labour as such.**

## OBSERVED BY

Mr. O. Chinnappa Reddy and V. Khalid  
Hon'ble Judges, Supreme Court of India

## IN

W. P. No. 19 of 1986 decided on 4th February, 1987 in the case of Catering Cleaners of Southern Railway etc.—Petitioners v. Union of India and Anr. Respondents.

## TEXT

O. Chinnappa Reddy, J. :—The petitioners describe themselves as 'catering cleaners of Southern Railways represented by V. China Thambi and M. Monan in the Vegetarian Refreshment Room, Central Station, Madras'. The petition claimed to be filed in a representative capacity on behalf of about three hundred and odd catering cleaners working in the catering establishments in various railway junctions of the Southern Railway and in the pantry cars of long distance trains running under the control of the Southern Railway. Since a long time they have been agitating for the abolition of the Contract system under which they are employed to do cleaning work in the catering establishments and the pantry cars and for their absorption as regular employees of the principal employer, namely, the Southern Railway. They complain that they are not

even paid minimum wages. They are paid a pittance averaging from Rs. 200/- to Rs. 250/- per day. Although the contract system has been abolished in almost all the other Railways, the Southern Railway persists in employing contract labour for cleaning its catering establishments and pantry cars. As the several representations made by them to the authorities concerned proved fruitless they have been forced to seek the intervention of this Court under Art. 32 of the Constitution to direct the respondents to exercise their powers under section 10 (1) of the Contract Labour (Regulation and Abolition) Act, 1970 and to abolish the contract system in respect of catering cleaners in the Southern Railway and further to direct the respondents to regularise the services of the existing catering cleaners employed in the catering establishments at various



junctions and in the pantry cars of long distance trains and to absorb them as employees of the catering establishments of the Southern Railway. They also seek a direction to extend to them the service benefits presently available to other categories of employees in the catering establishments of the Railways.

2. We issued notice to the respondents on January 21, 1986. After some considerable time the writ petition was listed before us on August 5, 1986. We were informed at that time that in almost all the railways except the Southern Railway, the contract labour system had been abolished in regard to catering cleaners. We wondered why the Southern Railway could not also fall in line and directed the Southern Railway Administration to consider whether the contract labour system could not be abolished in the Southern Railway also and whether the services of the catering cleaners could not be suitably regularised. The learned counsel for the workmen complained before us that the workmen were not even being paid the minimum wages. As the Railways Administration was the principal employer, we directed the Railways Administration to take immediate steps to see that the minimum wages were paid to the catering cleaners. As the interim order of the Court regarding payment of wages was not complied with, the petition was adjourned from time to time. On April 19, 1986 we also made a further order that the Southern Railway Administration should not take any further action pursuant to the tenders

invited by them for contract labour. On December 4, 1986 the Additional Solicitor General who appeared on behalf of the Railway. Administration undertook to deposit the arrears due from August upto date with the Deputy Labour Commissioner, Madras. We also directed the learned counsel for the employees to fill a list of the employees entitled to be paid wages. We directed that the amount should be paid after verification by the Deputy Chief Superintendent, Southern Railway. We were told that there is some dispute about the names of the employees, we now directed that the Deputy Labour Commissioner, Madras will enquire into the question as to who were working as Catering cleaners in the Madras Central Station and also to determine the wages due to them from August, 1986 upto date giving credit to any amount that may have been paid to them. On such determination, the Railway Administration shall deposit the amount with the Deputy Labour Commissioner who shall pay over the same to the employees. The determination by the Deputy Labour Commissioner is directed to be completed before February, 28, 1987 and the deposit by the Administration is directed to be made before March 15, 1987. This part of the order covers only the catering cleaners employed in the Central Station, Madras.

3. In answer to the writ petition the Railway Administration has adopted a somewhat unhelpful attitude



According to the Administration it has been found to be possible to abolish the contract labour system because the nature of the cleaning work in the catering units of the Southern Railway was fluctuating and intermittent. The contract labour system is followed not only in the Southern Railway but also in the South Central Railway and the Southern Railway. They claim that any departmental units not working profitably could be handed over to a private licensee and this was the alternative which was adopted by the Southern Railway in the case of catering cleaners. Experience showed that it was difficult to extract work from catering cleaners when they were engaged on a regular basis in the railway and it was not possible to supervise their work effectively. According to them, all pros and cons were examined before entrusting the catering work to private contractors. The Southern Railway had a moral responsibility to the public to ensure satisfactory service and that was the reason why the work was entrusted to a private agency which was considered the most suitable method of doing the work.

4. We notice that the Railway Administration has not chosen to support its statements by any facts and figures but has contented itself by making vague and general statements. No attempt has been made to explain why what has been done in most of the other railways cannot be and should not be done in the Southern Railway. It is not explained why cleaning

work is considered to be intermittent and what difficulty exists in supervising the work. The Railway Administration wants to suggest that the units are working at a loss without expressly saying so. The suggestion is implicit in the statement that department units not working profitably could always be handed over to private licensees. We are afraid that everything that has been said by the Administration of the Southern Railway against abolishing the contract labour system and regularising the services of the catering cleaners has been contradicted by the Parliamentary Committee of Petitions under the Chairmanship of Shri K. P. Tewari who went into the question in some depth. The Committee was submitting its report on the complaint of Shri Samar Mukherji, a member of Parliament regarding the grievances of the railway catering workers working under contractors in the Southern Railway. The Committee first dealt with the grievances of the Bearers and Servers. In paragraph 2.19 of their report the Committee noticed that the railway catering department was earning a profit of about Rs. 50 lakhs per annum. In paragraph 2.21 the Committee dealt with the grievances of the catering cleaners. We think that it will be useful to extract here the whole of paragraph 2.21 of the report. It is as follows :

“It has been submitted in the representation that as the job of the cleaners is of permanent nature these cleaners should be absorbed by the



Railways on regular basis. During their study visit, it was pointed out by the petitioners to the Committee that cleaners were not paid minimum wages statutorily fixed by State Governments by the contractors and there was no machinery set up by the Southern Railway to ensure that all labour laws regarding minimum wages, overtime allowances, payment of compensation etc. were implemented in their case. In this connection, the Ministry of Railways (Railway Board) in their written note have stated that the work of cleaning is entrusted to contractors as per the recommendations of High power Committee (Alagesan Committee) appointed by the Ministry of Railway in the year 1955 so that the establishment cost could be kept down. If this work is entrusted to the regular railway employees the establishment cost would go up and this would prove to be an uneconomical proposition. The Ministry have further stated that the cleaning contractors at Madras and Bangalore City have engaged 61 and 22 cleaners respectively who are paid fair living wage of Rs. 5.25 per head at Madras Central Railway Station and at Rs. 8.06 per cleaner per day at Bangalore City Railway Station as fixed by the State Governments of Tamil Nadu, Karnataka. These payments are witnessed by the Railway's representative.

The Committee, however, are of the opinion that the job of cleaning in Railway Catering Units is of a permanent nature. Further if the work which is at present being done by a very small

number of cleaners employed through the contractors by the Southern Railway is entrusted to the regular employees the establishment cost would increase only marginally and it will not in any way affect the profits being earned by the Catering Department. The Committee recommend that the Government should review the present practice of employment of cleaners through contractors and consider their employment directly by the Railways. This would end the exploitation of cleaners which has also been alleged in the representation.

K. P. Tewari  
 Chairman

New Delhi

Dated the 30th April, 1984

Vaisaka 10, 1906 (Saka)

Committee  
 of Petitions

5. The Report, we see, states that the railway catering department was earning a profit, that the work of the catering cleaners was of a perennial nature, that the cost of entrusting the work to regular employees would increase the establishment cost only marginally and that the laws relating to minimum wages, overtime allowances etc. and other labour laws were not being observed in regard to the catering cleaners. The recommendation of the Committee was that in order to prevent the exploitation of cleaners, it was necessary that the Government should review the existing practice of employing them through contractors and consider their direct employment by the Railway Administration. Strengthened by the report of the Committee, the catering cleaners submitted several



memoranda to the authorities concerned to no avail.

6. The practice of employing labour through contractors for doing work inside the premises of the primary employer, known to researchers of the International Labour Organisation and other such organisations as 'labour only contracting' or 'inside contracting' system has been termed as archaic system and a relic of the early phase of capitalist production, which is now showing signs of revival. In the more recent period of late there has been a noticeable tendency on the part of big companies including public sector companies to get the work done through contractors rather than through their own departments. As pointed out by a group of researchers in the Economic and Political Weekly, Review of Management, dated November 29, 1986, it is a matter of surprise that employment of contract labour is steadily increasing in many organised sectors including the public sector. Which one expects of function as a model employer. More than a quarter of a century ago in the *Standard Vacuum Refining Company of India Ltd v. Its Workmen* 1960 (3) S. C. R. 466, this Court had occasion to refer to some of the pernicious features of the contract labour system. It is an important decision, unfortunately not very much noticed in later cases. The importance of the case lies in the fact that it was held to be competent for an Industrial Tribunal functioning under the Industrial Disputes Act to abolish the contract

labour system in an industrial undertaking which happened to be a private enterprise in that case. The facts are interesting. A dispute was raised by the workmen of the company with respect to contract labour, employed by the company (the Standard Vacuum Refining Company of India Limited) for cleaning maintenance of the refinery (plant and premises), belonging to the company. The system was that the work was entrusted to a contractor who engaged the labour. The regular workmen of the Company made a demand for abolition of the contract system and for absorbing the workmen employed through the contractors into the regular service of company. The complaint of the workmen was that the contract labour had no security of service though they were doing the work of the company and that they were being paid much less than the wages paid by the company to its unskilled regular workmen. They were also not entitled to other benefits and amenities such as provident fund, gratuity, bonus privilege leave, medical facilities and subsidised food and housing to which the regular workmen of the company were entitled. Their case was that though the work was of a permanent nature, the contract system had been introduced to deny them the rights and benefits which the company gave to its regular employees. On behalf of the company, it was contended that the reference under Section 10 of the Industrial Disputes Act was incompetent as there was no dispute between the Company and



its workmen, that, it was a matter for the Company to decide what was the best method of carrying out its business, whether by employing a Contractor or otherwise and that the Industrial Tribunal could not interfere with that function of the management. The dispute regarding wages and conditions of service was really one to be settled between the Contractor and his employees and had nothing to do with Company. The Tribunal by its award gave a direction to the company to discontinue the practice of getting the work done through contractors and to have it done through workmen engaged by itself. The company was directed to engage regular workmen for this work and to give preference to the workmen employed by the contractor. There was an appeal to the Supreme Court by Special leave under Article 136 of the Constitution. The Supreme Court held that the Tribunal was justified in giving the direction for the abolition of the contract system, observing that it was relevant to bear in mind that industrial adjudication generally did not encourage the employment of contract labour in modern times. Quoting from the report of the Royal Commission on Labour, it was said that whatever merit there was in the system in primitive times, it was now desirable for the management to discharge completely the complex responsibility laid upon it. The Court also referred to similar opinions expressed by several Labour Enquiry Committees appointed in different States Proceeding to consider the merit of the contract

labour system in the case before the Wanchoo J. speaking for the Court observed :—

“The contract in this case related to four matters. But the reference is confined to one only, viz., cleaning maintenance work at the refinery including premises and plant and we shall deal with that only. So far as this work is concerned, it is incidental to the manufacturing process and is necessary for and of a perennial nature which must be done every day. Such work is generally done by workmen in the regular employment of the employer and there should be no difficulty in having regular workmen for this kind of work. The matter would be different if the work was of intermittent or temporary nature or was so little that it would not be possible to employ full time workmen for the purpose. Under the circumstances the order of the tribunal appears to be just and there are no good reasons for interfering with it.”

The Court held that the contract in the case was a bona fide contract but that it did not affect the issue. The award of the Tribunal was upheld.

7. The Supreme Court having pronounced on the ‘primitive’ and baneful nature of the system of contract labour, there was a cry raised against the system by the planning Commission



**O. Chinnappa Reddy**  
**Judge**  
**Supreme Court of India**

various other committees appointed by the Government. The Indian Labour Conference discussed the award of the minimum in 1959 and following its recommendation but after considerable delay, the contract Labour (Abolition and Regulation) Act was passed in the Statement of Objects and Reasons as follows :—

“They system of employment of contract labour lends itself to various abuses. The question of its abolition has been under the consideration of Government far a long time. In the second Five year plan, the planning Commission made certain recommendations, namely, under taking of studies to ascertain the extent of the problem of contract labour, progressive abolition of system and improvement of service, conditions of contract labour where the abolition was not possible. The matter was discussed at various meetings of Tripartite Committees at which the State Government were also represented and general consensus of opinion was that the system should be abolished wherever possible or practicable and that in cases where this system could not be abolished altogether, the working conditions of contract labour should be regulated so as to ensure payment of wages and provision of essential amenities.

The proposed Bill aims at abolition of contract labour in respect of such categories as may be notified by appropriate Government in the light of certain criteria that have been laid down, and at regulating the service conditions of contract labour where abolition is not possible. The Bill provides for the setting up of Advisory Boards of a tripartite character, representing various interests, to advise Central and State Governments in administering the legislation and registration of establishments and contractors. Under the Scheme of the Bill, the provision and maintenance of certain basic welfare amenities for contract labour like drinking water and first-aid facilities, and in certain cases rest-rooms and canteens, have been made obligatory. Provisions have also been made to guard against details in the matter of wage payment.”

The long title of the Act describes it as “an Act to regulate the employment of contract labour in certain establishments and to provide for its abolition in certain circumstances and for matters connected therewith”. Section 1 (4) makes the Act applicable to all establishments in which 20 or more workmen are employed or were employed on any day of the preceding 12 months as contract labour and to every contractor who employs or who employed on any day of the preceding 12 months 20 or more workmen. Section 1 (5) makes the Act



inapplicable to establishments in which work only of an intermittent or casual nature is performed and further provides that the question whether work performed in an establishment is of an intermittent or casual nature, if raised, shall be decided by the appropriate Govt. in consultation with the Central Board or State Board as the case may be and that such decision final. Sec. 2 (b), (c) and (g) define "Contract Labour", "Contractor", "Establishment" and "Principal Employees" in the following terms :—

"(b) a workman shall be deemed to be employed as "contract labour" in or in connection with the work of an establishment when he is hired in or in connection with such work by or through a contractor, with or without the knowledge of the principal employer;

"(c) "contractor", in relation to an establishment, means a person who undertakes to produce a given result for the establishment, other than a mere supply of goods or articles of manufacture to such establishment, through contract Labour or who supplies contract labour for any work of the establishment and includes a sub-contractor;"

"(e) "establishment" means—

- (i) any office or department of the Government or a local authority, or

- (ii) any place where any industry, trade, business, manufacture or occupation is carried on;"

"(g) "principal employer" means—

- (i) in relation to any office or department of the Government or a local authority, the head of the office or department or such other officer as the Government or the local authority, as the case may be may specify for this behalf,
- (ii) in a factory, the owner or occupier of the factory and where a person has been named as the manager of the factory under the Factories Act, 1947 the person so named,
- (iii) in a mine, the owner or agent of the mine and where a person has been named as the manager of the mine, the person so named,
- (iv) in any other establishment, any person responsible for the supervision and control of the establishment.

Explanation :— For the purpose of sub-clause.

- (iii) of this clause, the expressions "mine", "owner" and "agent" shall have the meanings



**O. Chinnappa Reddy**  
**Judge**  
**Supreme Court of India**

ings respectively assigned to them in clause (j) clause (1) and clause (e) of sub-section (1) of section 2 of the Mines Act 1952.”

Section 3 and 4 provide for the constitution of the Central and State advisory boards. Section 7 provides for the registration of establishments. Section 8 provides for revocation of registration in certain cases and Section 9 prescribes the effect of non-registration. Section 10 provides for the prohibition of employment of contract labour in certain processes, operations or other work in establishments by the appropriate Government after consultation with the Central State Board as the case may be. Sec. 11 as follows :—

“10. (1) Notwithstanding anything contained in this Act, the appropriate Government may, after consultation with the Central Board or, as the case may be, a State Board, prohibit, by notification in the Official Gazette, employment of contract labour in any process, operation or other work in any establishment.

(2) Before issuing any notification under sub-sec. (1) in relation to an establishment, the appropriate Government shall have regard to the conditions of work and benefits provided for contract labour

in that establishment and other relevant factors, such as —

- (a) whether the process, operation or other work is incidental to, or necessary for the industry, trade, business, manufacture or occupation that is carried on in the establishment.
- (b) whether it is of perennial nature, that is to say, it is of sufficient duration having regard to the nature of industry, trade, business, manufacture or occupation carried on that establishment ;
- (c) whether it is done ordinarily through regular workmen in that establishment or an establishment similar thereto ;
- (d) whether it is sufficient to employ considerable number of whole time Government workmen.

Explanation :— If a question arises whether any process or operation or other work is of perennial nature, the decision of the appropriate thereon shall be final.”

Section. 19 provides for licensing of contractors. Section 13, 14 and 15 provide for the grant, revocation, suspension, and amendment of licenses and appeals secs. 16 to 21 make detailed provision for the welfare and Health of contract labour. Section 16 deals with



canteens, Section 17 with Rest rooms, Section 18 with facilities for drinking water, latrines, urinals and washing and Sec. 19 with first-aid facilities Section 20 provides that if any amenity required to be provided under Sections 16 to 19 for the benefit of contract labour employed in an establishment is not provided by the contractor within the prescribed time such amenity shall be provided by the Principal Employer within such time as may be prescribed. Section 21, while making the contractor responsible for payment of wages to each worker employed by him as contract labour, further provides that every principal Employer shall nominate a representative duly authorised by him to be present at the time of disbursement of wages by contractor ensure and certify that wages are paid in the prescribed manner. It is further provided that if the Contractor fails to pay wages within the prescribed time or makes short payment, it shall be the liability of Principal Employer to make payment of wages in full. Section 22 to 27 provide for penalties and procedure. Sec. 28 provides for appointment of inspecting staff. Section 30 makes the provisions of the Act effective notwithstanding anything inconsistent therewith contained in any other law or in the terms of any agreement or contract of service or any standing orders applicable to the establishment. Any favourable benefits that the Contract labour, may be entitled to under the agreement contract of service or standing orders are however saved. Section, 31 provides for exemp-

tions. Section 33 enables the Central Government, to give directions to a State as to the carrying into execution of the State the provisions of the Act. Section 35 provides for the making of rules for carrying out the purposes of the Act. The Rules made by the Central Government are required to be placed before Parliament.

8. The Central Government ; exercise of the powers conferred by Section 35 of the Act, has made the contract Labour (Regulation and Abolition) Central Rules, 1967. Chapter II of the rules relates to matter pertaining to Central Board, while chapter III of the Rules deals with registration of establishments and licensing of contractors. Rule 25 prescribes the forms, terms, and condition of license and in particular Rule 25 (ii) (iv) prescribes that it shall be the condition of every license that the rates of wages shall not be less than the rates prescribed under the Minimum Wages Act, 1948. Rule 25 (ii) (iv) prescribes that it shall be the condition of every licence that the rates of wages shall not be less than the rates prescribed under the Minimum Wages Act, 1948 for such employment where applicable, and where the rates have been fixed by agreement, settlement or award not less than the rates so fixed, Rule 25 (ii)(v) (a) prescribes that it shall be a condition of every licence that,

“in cases where the workmen employed by the contractor perform the same or similar kind of work as the workmen



directly employed by the principal employer of the establishment, the wage rates, holidays, hours of work and other conditions of service of the workmen of the contractor shall be the same as applicable to the workmen directly employed the principal employer of the establishment on the same or similar kind of work :

Provided that in the case of any disagreement with regard to the type of work the same shall be decided by the Chief Labour Commissioner (Central) whose decision shall be final"

Similarly Rule 25 (ii) (v) (b) provides that in other cases the wage rates, holidays, hours of work and conditions of service of the workmen of the contractor shall be such as may be specified in this behalf by the Chief Labour Commissioner (Central). While determining the wage rates, holidays, hours of work and other conditions of service under rule 25 (ii)(v) the Chief Labour Commissioner is required to have regard to the wages rates, holidays, hours of work and other conditions of service obtaining in similar establishments.

9. On the facts presented to us and the report of the Parliamentary Committee of Petitions it appears to be clear that the work of cleaning catering establishments and pantry cars is necessary and incidental to the industry or business of the Southern Railway and so requirement (a) of Section 10 (2) is satisfied, that it is of a perennial nature and so re-

quirement (b) is satisfied, that the work is done through regular workmen in most Railways in the country and so requirement (c) is satisfied and that the work required the employment of sufficient number of wholtime workmen and so requirement (d) is also satisfied. Thus all the relevant factors mentioned in Section 10 (2) appear to be satisfactorily accounted for. In addition we have the factor of profitability of the catering establishments. On these facts the petitioners straight away invite us to issue a mandamus directing the Central Government to abolish the contract labour system under which cleaners in catering establishments and pantry cars are at present employed in the Southern Railway. But, refrain from doing so because under Section 10, Parliament has vested in the appropriate Government the power to prohibit the employment of contract labour in any process, operation or other work in any establishment. The appropriate Government if required to consult the Central Board or the state Board as the case may be before arriving at its decision. The decision, of course, will be subject to judicial review. But we do not think we will be justified in issuing the mandamus prayed for unless and until the Government fails or refuses to exercise the power vested in it under Section. 10. In the circumstances the appropriate order to make in the present case is to direct the Central Government to take appropriate action under section. 10 of the Contract Labour (Abolition and Regulation) Act in the matter of prohibiting the employment of contract labour in the work of cleaning catering establishments and pan-



tery cars in the Southern Railway. This must be done within six months from today, without waiting for the decision of the Central Government the administration of the Southern Railway will be free, of its own motion to abolish the Contract labour system and to regularise the services of those employed in the work of cleaning catering establishments and pantry cars in the Southern Railway. In any case, the administration of the Southern Railway will refrain, until the decision of the Central Government under section 10 from employing Contract labour. The work of cleaning catering establishments and pantry cars will be done departmen-

tally by employing these workmen who were previously employed by the Contractor on the same wages and conditions of work as are applicable to those engaged in similar work by the Western Railway. If there is any dispute whether an individual workman was or was not employed by the Contractor such dispute shall be decided by the Deputy Labour Commissioner, Madras. Any further directions may be sought, if necessary, from the Madras High Court. If the Central Government does not finally decide the question within six months from today, the Southern Railway administration will within three months thereafter absorb the workmen in their service and regularise their service.



## OBSERVATION

**Age determination—In calculating a person's age, the date of his birth must be contended as a whole day and he attains the specified age on the day preceding the anniversary of his birth day.**

## OBSERVED BY

Mr. A. P. Sen and

Mr. B. C. Ray

Hon'ble Judges, Supreme Court of India

## IN

Civil Appeal No. 531 of 1986, decided on 28th August, 1986 in the case of prabhu Lal Sharma, Appellant v. State of Rajasthan and another, Respondents.

## TEXT

A. P. Sen, J. The short point involved in this appeal by special leave pertains to the determination of age at a particular point of time. The question is whether the appellant having his date of birth as January 2, 1956 had attained the age of 28 years on January 1, 1984 and was therefore disqualified from being considered for direct recruitment to Rajasthan Administrative Service under Rule 1-B of the Rajasthan State & subordinate Services (Direct Recruitment by Competitive Examination) Rules, 1962 or short 'the Rules').

2. But very briefly the essential facts are these. The Rajasthan Public Service Commission invited applications for direct recruitment to the Rajasthan Administrative Service and allied services of the Government of Rajasthan by competitive examination to be held in 1983. Under the directions issued by the Commission, the minimum age prescribed for candidates was 21 years and

the maximum 28 years. It was prescribed that the candidate should have attained the age of 21 years on January 1, 1984 and should not have attained the age of 28 years i.e. on the first day of January next following the last date fixed for receipt of application. The appellant was allowed to appear in the written examination, but by an order dated June 12, 1984, the Assistant Secretary to the Commission intimated the appellant that his candidate was rejected on the ground that he had attained the age of 28 years on January 1, 1985 and was therefore, ineligible for consideration. Feeling aggrieved, the appellant moved the High Court under Art. 226 of the Constitution and contended that his date of birth was January 2, 1956 and that he had not attained the age of 28 years on January 1, 1984. His claim was contested by the respondents who pleaded that the appellant had attained the age of 28 years on



January 1, 1984 and therefore his form was properly rejected. During the pendency of the writ petition, the High Court by an interim order dated September 14, 1984 directed the Commission to interview the appellant if he was otherwise eligible for being considered except on the ground of age. The appellant was accordingly interviewed but the result was withheld. A learned Single Judge by his judgement and order dated January 19, 1985 held that if the date of birth of the appellant was January 2, 1956 he would complete the age of 28 years only at the end of the day on January 1, 1984 and therefore he could not be said to have attained the age of 28 years on that date. He accordingly held that the Commission was not justified in rejecting the candidature of the appellant on the ground that he had attained the age of 28 years on January 1, 1984 and therefore was not eligible for consideration.

2. On appeal, a Division Bench disagreed with the view expressed by the learned Single Judge and reversed his judgement on the ground that the words used in r. 11. B of the Rules are 'must not have attained the age of 28 years on the first day of January next following the last date fixed for receipt of application' and not that he should have completed the age of 28 years on that day. They relied upon the undisputed fact that the first day of January next following the last date fixed for receipt of application in this case was January 1, 1984. Accordingly, they held that the appellant was born on January 2, 1956

and as such, he had attained the age of 28 years as soon as the first day of January, 1984 commenced. They further held that the appellant had not on January 1, 1984 attained the age of 28 years, but he had also completed the same at 12 O'clock in the midnight of January 1, 1984. According to the learned Judges, on January 2, 1984, the appellant would be one day more than 28 years and, as such he was disqualified to appear at the examination under r. 11-B of the rules. The conclusion of the learned Judges must best be stated in their own words :

"In calculating a person's age the day of his birth must be counted as a whole day and he attains the specified age on the day preceding anniversary of his birth day."

3. In coming to that conclusion the learned Judges relied upon the language of r. 11-B of the Rules which prescribes the age limit for the said examination and also referred to S. 4 of the Indian Majority Act 1875. They have relied on certain decisions of different High Courts, particularly to that of *Vatsala Rani* represented by guardian ad litem and her, *P.M.G. Kini v. Selection Committee for Admission to Medical College, Bangalore-2*, represented by the secretary AIR 1967 Mysore 135, and some English decisions laying down the principle for determination of age.

4. It is argued that the learned Judges were in error in introducing the legal concept of the age of majority as laid down in S. 4 of the Indian Majority Act, 1875 for the purpose of interpreting



B. It is said that the purpose of r. 11B framed by the Government was to describe the maximum and maximum limits for entry into the Rajasthan Administrative Service and allied services of the Government of Rajasthan. It is submitted that as commonly understood a person attains a particular age after he has completed a given number of years. It is said that there is no reason why the words of r. 11B 'must have attained the age of 21 years and must not have attained the age of 28 years' should not be understood in the ordinary sense. At first blush, the contention advanced appears to be rather attractive but on deeper consideration it cannot prevail.

5. Learned counsel for the appellant drew our attention to the fact that the Union Public Service Commission has been interpreting the words 'must have attained the age of 21 years and must not have attained the age of 26 years on the first day of August next following' in the way the appellant contends for. These words are taken from r. 4 of the Indian Administrative Service (Appointment by Competitive Examination) Regulations, 1955 framed by the Central Government in pursuance of r. 7 of the Indian Administrative Service (Recruitment) Rules, 1954. Presumably, there would be similar provisions laying down the qualification as to age in other central services as well. 4 in so far as material reads:

"4. Conditions of Eligibility—  
In order to be eligible to compete at the examination, a candidate

must satisfy the following conditions, namely :

- (i) X X X X X
- (ii) Age—He must have attained the age of 21, and not attained the age of 28 on the first day of August of the year in which the examination is held :

Provided that the upper age limit may be relaxed in respect of such categories of persons as may from time to time, be notified in this behalf by the Central Government to the extent and subject to the conditions notified in respect of each category."

6. Undoubtedly, the Union Public Service Commission has been interpreting the provision as to attainment of age in a like manner. This would be clear from the advertisement issued by it on December 8, 1984 which is in these terms :

"Age limit : (ka) The candidate should have attained the age of 21 years on 1st August 1985, but should not have attained the age of 26 years, that is, he should not have been born before the 2nd August, 1959 and after the 1st August, 1964."

We are afraid, the interpretation of r. 11B of the Rules cannot proceed upon the basis adopted by the Union Public Service Commission.

Rule 11B of the Rules provides:



“11B, Age, Notwithstanding anything contained regarding age limit in any of the service Rules governing through the agency of the Commission to the posts in the State Service and in the Subordinated Service mentioned in Schedule I and in Schedule II respectively, a candidate for direct recruitment to the posts to be filled in by combined competitive examinations conducted by the Commission under these Rules must have attained the age of 21 years and must not have attained the age of 28 years on the first day of January next following the last date fixed for receipt of application.”

It is plain upon the language of r. 11B that a candidate ‘must have attained the age of 21 years and must not have attained the age of 28 years on the first day of January next following the last date fixed for receipt of application’. Last day fixed for receipt of application in this case, was January 1, 1983. First day of January next following that day would be January 1, 1984. The object and intent in making r. 11B was to prescribe the age limits upon which the eligibility of a candidate for direct recruitment to the Rajasthan Administrative Service and other allied services is governed. At first impression, it may seem that a person born on January 2, 1965 would attain 28 years of age only on January 2, 1984 and not on January 1,

1984. But this is not quite accurate. In calculating a person's age, the day of his birth must be counted as a whole day and he attains the specified age on the day preceding, the anniversary of his birth day. We have to apply well established rules for computation of time. One such rule is that fractions of a day are to be omitted in computing a period of time in years or months in the sense that a fraction of a day will be treated as a full day. A legal day commences at 12 o'clock midnight and continues until the same hour the following morning. There is a popular misconception that a person does attain a particular age on the day of his birth and he is eligible thereafter less and until he has completed a given number of years. In the absence of any express provision, it is well-settled that any specified age in law is to be construed as having been attained on the day preceding the anniversary of the birth day.

7. In Halsbury's Laws of England, 3rd edn., vol. 37, Para 178 at p. 100, the law was stated thus :

In computing a period of time in years or months, on regard to fractions of a day, at any rate, when counted in years or months, on regard to fractions of a day, in the sense that the period is regarded as complete although it is short to the extent of a fraction of a day.....

Similarly, in calculating a person's age the day of his birth counts as a whole day, and he attains a specified age on the day next before the anniversary



of his birth day”.

8. We have come across two English decisions on the point. In *Rex v. Scoffin*, LR (1930) 1 KB 741, the question was whether the accused had or had not completed 21 years of age. S. 10 (1) of a Criminal Justice Administration Act, 1914 provides that a person might be sent to Borstal if it appears to the court that he is not more than 21 years of age. The accused was born on February 17, 1909. Lord Hewart, CJ held that the accused completed 21 years of age on February 16, 1930 and he was one day more than 21 years of age on February 17, 1930 which was the Commission day of Manchester Assizes.

6. In *Re. Shurey, Savory v. Shurey*, LR (1918) 1 Ch. 1963, the question that arose for decision was this. Does a person attain a specified age in law on the anniversary or his or her birthday, or on the day preceding that anniversary? After reviewing the earlier decisions, Sargant, J. said that law does not take cognizance of part of a day and the consequence is that person attains the age of twenty one years or of twenty-five years, or any specified age, on the day preceding the anniversary of his twenty-first or twenty-fifth birthday or other birthday, as the case may be.

10. From Halsbury's Laws of England, 4th edn., vol. 45, para 1143 at p. 550 it appears that s. 9 of the Family Law Reforms Act, 1969 has abrogated the old common law rule stated in *re. Shurey, Savory v. Shurey* (supra).

11. It is in recognition of the difference between how a person's age is lega-

lly construed and how it is understood in common parlance. The Legislature has expressly provided in s. 4 of the Indian Majority Act, 1875 that how the age of majority is to be computed. It reads :

“4. Age of majority how computed

In computing the age of any person, the day on which he was born is to be included as a whole day, and he shall be deemed to have attained majority, if he falls within the first paragraph of s. 3, at the beginning of the twenty first anniversary of that day, and if he falls within the second paragraph of s. 3, at the beginning of the 18th anniversary of that day.”

The Section embodies that in computing the age of any person, the day on which he was born is to be included as a whole day and he must be deemed to have attained majority at the beginning of the eighteenth anniversary of that day. As already stated, a legal day commences at 12 o'clock midnight and continues until the same hour the following night. It would therefore appear that the appellant having been born on January 2, 1956, he had not only attained the age of 28 years but also completed the same at 12 o'clock on the midnight of January 1, 1984. On the next day i. e. on January 2, 1984, the appellant would be one day more than 28 years. The learned Judges were therefore right in holding that the appellant was disqualified for direct recruitment to the Rajasthan Administrative Service and as such was not entitled to



appear at the examination held by the Rajasthan Public Service Commission in 1983. We affirm the view taken by the learned Judges as also the decision in *G. Vatsala Rani's case*, supra.

12. It is rather unfortunate that the appellant should upon the construction placed on r. 11B of the Rajasthan State & Subordinate Service (Direct Recruitment by competitive Examination) Rules, 1962 fail to secure entry into the Rajasthan Administrative Service and allied services of the Government of Rajasthan merely because he exceeds the upper age limit just by one day. The Government ought to consider the question of relax-

ing the upper age limit in the case of the appellant in order to mitigate the hardship, if otherwise permissible. There is a need for a provision like the proviso to r. 4 of the Indian Administrative Service (Appointment by Competitive Examination) Regulations, 1955, conferring the power of relaxation on the State Government under certain conditions without which a deserving candidate would be rendered ineligible for appointment.

13. The result is that the appeal must fail and is accordingly dismissed. There shall be no order as to costs.

Appeal dismissed



**V. Khalid**  
**Judge**  
**Supreme Court of India**

### OBSERVATION

**Termination — Absent from service — Without considering the position in the deputed foreign service, the service conditions there, his position there etc. is not justified.**

### OBSERVED BY

**Mr. V. Khalid and Mr. G. L. Oza**  
**Hon'ble Judges, Supreme Court of India**

### IN

**W. P. No. 3832 of 1978 decided on 19th September 1986, in the case of v. Sridhdhan Nair, Petitioner v. State of Kerala and others, Respondents.**

### TEXT

Khalid, J. The petitioner was a Laboratory Attendant in the University Intermediate College (now called Arts College), Trivandrum in the Collegiate Education Department. He was deputed to the City Improvement Trust as per Government Order dated 24-10-61. The period of deputation was two years from the date of the Order or from the date of his relief from the College. He was relieved of his duties with effect from 10-10-61, by the Department of Collegiate Education. His deputation period was extended for a further period of one year from 1-11-63 and for a further period of two years with effect from 1-11-64. The extended period expired on 31-10-66. In the last order extending the period of deputation, it was made clear that no further extension would be allowed.

2. During the deputation period he was promoted as Upper Division Clerk in

the City Improvement Trust. The Petitioner made a representation on 3-9-66, requesting the State Government to allow him to continue in the City Improvement Trust, terminating his lien in the Collegiate Education Department. No orders were passed by the Directorate of Collegiate Education or by the Government on this representation.

3. The petitioner continued in the City Improvement Trust, on deputation. Meanwhile the City Improvement Trust was merged with the Kerala State Housing Board, respondent No. 3 herein. While so, on 29-3-72, orders were passed terminating the lien of the petitioner in the Department of Collegiate Education in purported exercise of the powers contained in Rule 24 of the Kerala Service Rules. A show cause notice was issued by the Director of Collegiate Education on 21-3-1973, asking the petitioner to submit his explanation against the proposed removal of his lien in that department. The



petitioner submitted a representation dated 26-3-1973, stating that he was not at fault in not joining duty in the parent department and that he was retained in foreign service anticipating Government's orders. In view of the merger of the City Improvement Trust with the Kerala Housing Board, he was not interested in continuing on deputation. He further requested the period after 1-11-1966, may be treated as an extension of the deputation period. The explanation was not accepted and orders were finally passed terminating the lien of the petitioner. Hence this writ petition.

4. It is necessary to state a few facts to understand what happened after the petitioner's deputation. The petitioner thought that he was secure in the deputed service and that he would stand to gain therein if he continued there when compared to his parent department. He had challenged the order passed by the Director of Collegiate Education terminating his lien by filing Original Petition No. 3779 of 1973 in the Kerala High Court. Earlier he had filed an Original Petition No. 31 of 1973 in the same High Court against the State of Kerala and the Kerala State Housing Board when he reverted from the post of Upper Division Clerk to that of Lower Division Clerk in the Housing Board, for not passing the Accounts Test. He succeeded in this writ petition. He appears to have been unduly elated over this success and allowed the original petition No. 3779 to be dismissed as not pressed. The main ground why he did not press the original petition No. 3779 of

1973 was that he had obtained a favorable order in the other original petition. As ill-luck would have it, the matter taken in appeal by the State Housing Board and the Division Bench of the Kerala High Court reversed that judgement. Thus the petitioner was victim of unfavourable circumstances and fluctuations in fortunes.

5. Normally we would have dismissed this writ petition on the short ground that the petitioner had invoked the jurisdiction of the High Court under Article 226 of the Constitution to get the order under challenge in this writ petition to be pushed, and after invoking this jurisdiction had allowed the original petition wherein the said challenge was made to be dismissed as not pressed. But, as indicated above, the petitioner at that time did not anticipate what was in store for him in future.

6. It was as per a Government order that he was deputed on foreign service. It is true that when the deputation was extended, it was made clear that the deputation would expire on 31-10-1966 finally. The petitioner was put on notice that there would not be any further extension. There was some indifference on his part. But, there was greater in-action on the part of the respondent also. The petitioner had made a representation on 1-11-1966 to the respondents on which no orders were passed till 29-3-1972. When the petitioners realised that his prospects were not bright in the Kerala State Housing Board as he anticipated earlier, he was left with no option but to press



se that the order terminating his lien as bad in law. We do not think that the petitioner should be faulted for this inaction when we find that the respondents also contributed in a large measure to the unhappy State of affairs.

7. Rule 19 (a) in part I, Chapter III of the Kerala Service Rules reads as follows :

“An officer’s lien on a post may in no circumstances be terminated even with his consent, if the result will be to leave him without a lien or a suspended lien upon a permanent post.”

This rule mandates that an officer’s lien on a post shall not be terminated even with his consent if the consequence is to leave him without a lien or a suspended lien upon a permanent post. The State of Kerala, The Director of Collegiate Education and the Kerala State Housing Board are parties to writ petition. None of these parties have filed counter affidavits. We do not know the service conditions of the petitioner in the Housing Board. We do not know whether he occupies a permanent post there or not. Nor do we know whether he has a lien or a suspended lien in the Housing Board. Without being apprised of these details, the order of termination of lien cannot be allowed to stand as it would work great injustice against the petitioner. Rule 24 of the Kerala Service Rules is the next rule which is attracted in this case, which reads as follows :

“Unless the Government, in view of the special circumstan-

ces of the case, otherwise determine, after five years’ continuous absence from duty, an officer shall be removed from service after following the procedure laid down in the Kerala Civil Services (Classification, Control and Appeal) Rules, 1960.”

This rule speaks of removal from service when an officer has been continuously absent from duty for five years. This rule speaks of the existence of special circumstances which will enable the department concerned to save an officer from its vice. This rule also speaks of the necessity to follow the procedure laid down in the Kerala Civil Services (Classification, Control and Appeal) Rules 1960, for removal of an officer from service. The assumption on the part of the department in this case is that the petitioner’s continuance in the service of the Housing Board constituted absence from duty. We cannot subscribe to this view in the absence of compelling materials. It was not a case of his absents from duty after he was asked by the parent department to join it. At no time was he asked to join duty in the parent department. Without specific orders, the petitioner could not abandon the deputed foreign service and join the parent department. There should be a clear finding of continuous absence from duty by the department to attract Rule 24. The department also has to satisfy the Court whether the special circumstances of this case would not rescue the petitioner from the rigour of Rule 4. It is also necessary for this Court to be satisfied that the procedure laid down in



the Kerala Civil Services (Classification Control and Appeal) Rules, 1960, is complied with. The order terminating his lien is passed on the specious plea that his explanation is not satisfactory. The order should have been more articulate in its content. To sustain the order would virtually mean to deny the petitioner his service in the parent department and throwing him to the mercies of the Housing Board.

8. In this case, we are concerned more with consideration of justice than with mere technicalities of law. The petitioner has filed this writ petition as early as in 1978. It would be unfair and unjust to treat the period after 31-10-1966 to be one of continuous absence from duty. For and effective adjudication of the claim of the petitioner, his position in

the deputed foreign service, the service conditions there, his position there, etc., will have to be considered in detail. That has not been done. Under these circumstances, we hold that the petitioner is entitled to succeed. Accordingly, we quash the order No. B. 5-38127/66 dated 20 May, 1973, issued by the Director of Collegiate Education, Trivandrum, terminating the lien of the petitioner herein and direct the second respondent to issue a fresh show cause notice, give the petitioner an opportunity to make his explanation and also an opportunity of being heard and pass orders strictly in compliance with Rule 19(a) and Rule 24 of the Kerala Service Rules and in accordance with law, if the second respondent still feels that his lien should be terminated.

Petition allowed.



### OBSERVATION

**Termination—Rule or regulation framed by a public sector undertaking empowering the employer to terminate the services of an employee by giving notice of the prescribed period or payment of salary in lieu thereof is unconstitutional.**

### OBSERVED BY

Mr. M. P. Thakkar and  
 Mr. S. Natarajan

Hon'ble Judges, Supreme Court of India

### IN

Civil Appeal No. 1969 of 1986 decided on 26th September, 1986, in the case of P. Bhandari, Appellant v. Indian Tourism Development Corporation Ltd. & Ors. respondents.

### TEXT

Thakkar, J. A—CAT—scan of this appeal reveals there problems, viz—

1. Whether a rule or regulation framed by a public sector undertaking which is an authority under the control of Government of India and is a 'State' within the parameters of Article 12 of the Constitution of India empowering the employer to terminate the services of an employee by giving notice of the prescribed period or payment of salary for the notice period in lieu of such notice is constitutional?

11. If it is unconstitutional, whether the employee whose services are terminated under the said rule or regulation is always and invariably entitled to reinstatement? Whether option to pay compensation in lieu of reinstatement can be given to the employer in fit case?

III. What would be the appropriate amount to be reasonably awarded in lieu of reinstatement?

2. These are the questions which call for answers in this appeal.

3. Undisputed, are the following facts, the same being incapable of being disputed.

(1) The respondent Corporation (I. T. D. C.) is 'State' within the parameters of Article 12 of the Constitution of India it being an instrumentality of the State as per the law enunciated by this Court in Central Inland Water Transport Corporation Limited & Anr. v. Brojo Nath Ganguly and Anr. and Central Inland Water Transport Corporation Limited and Anr. v. Tarun Kanti Sengupta and



Anr.

- (2) Appellant was an employee of the Respondent Corporation holding the post of Hotel Ranjit, New Delhi, at the material time when his services were terminated by the impugned order.
- (3) Services of the Appellant were terminated in exercise of powers under Rule 31 (v) of the ITDC Conduct Discipline and Appeal Rules 1978, (ITDC) rules by giving pay for 3 months in lieu of 3 months' notice under the said rule.

4. Rule 31 (v) of the I. T. D. C. Rules, the constitutional validity of which is questioned from the platform of Articles 14 and 16 (1) of the Constitution of India, provides :

“31. Termination of services the services of an employee may be terminated by giving such notice or notice pay as may be prescribed in the contract of service in the following manner -

- |       |    |    |    |
|-------|----|----|----|
| (i)   | XX | XX | XX |
| (ii)  | XX | XX | XX |
| (iii) | XX | XX | XX |
| (iv)  | XX | XX | XX |
| (v)   | XX | XX | XX |

- (v) of an employee who completed his probationary period and who has been confirmed or deemed to be confirmed by giving him 90 days' notice or pay in lieu thereof.

this rule cannot co-exist with Articles

14 and 16 (1) of the Constitution of India. The said rule must therefore be struck down as unconstitutional provisions remain alive. otherwise, the guarantee enshrined in Articles 14 and 16 of the Constitution can be set at naught simply framing a rule authorizing termination of an employee by merely giving a notice. In order to uphold the validity of the rule in question it will have to be held that the tenure of service of a citizen who is engaged in employment with the State will depend on the pleasure or whim of a competent authority unguided by any principle or policy and that the service of an employee can be terminated at any time though there is no rational ground for doing so, even arbitrarily or capriciously. To uphold this right is to accord a "magna carta" to the authorities invested with these powers to practise uncontrolled discrimination at their pleasure or caprice on, considerations not necessarily based on the welfare of the organisation but possibly based on personal likes and dislikes, personal preferences and prejudices. An employee may be retained solely on the ground that he is a sycophant and indulges in flattery whereas the services of one who is meritorious (but who is wanting in the art of sycopancy and temperamentally incapable of indulging in flattery may be terminated. The power may be exercised even on the unrelated ground that the former belongs to the same religious faith or



the disciple of the same religious teacher or holds opinions congenial to him. The power may be exercised depending on whether or not the concerned employee belongs to the same region, or to the same caste as that of the authority exercising the power, of course without saying so. Such power may be exercised even in order to make way for another employee who is a favourite of the concerned authority. Provincialism, casteism, nepotism, religious fanaticism, and several other obnoxious factors may in that case freely operate on the mind of the competent authority in deciding whom to retain and whom to get rid of. And these dangers are not imaginary ones. They are very much real in organisations where there is a confluence of employees streaming in from different states. Such a rule is capable of robbing an employee of his dignity & making him a supine person whose destiny is at the mercy of the concerned authority (whom he must honour) notwithstanding the constitutional guarantee enshrined in Articles 14 and 16 of the Constitution of India. To hold otherwise is to hold that the fundamental right embedded in Articles 14 and 16 (1) is a mere paper tiger and that it is so ethereal that it can be nullified or eschewed by a simple device of framing a rule which authorizes termination of the service of an employee by merely giving a notice of termination. Under the circumstances the rule in question must be held to be

unconstitutional and void. This Court has struck down similar rule in similar situations. In *State Electricity Board v. D. B. Ghosh* (1985) 2 CR 1014, Chinnappa Reddy J. speaking for a three-Judge Bench of this Court has observed that a (similar) regulation authorizing the termination of the services of a permanent employee, by serving three months' notice or on payment of salary for the corresponding period in lieu thereof, was *ex facie* 'totally arbitrary' and capable of virious discrimination'. And that it was a naked hire and Fire rule and parallel of which was to be found only in the "Henry VIII clause" which deserved to be banished altogether from employer employee relationship. The regulation thus offended Article 14 of the Constitution of India and deserved to be struck down on that account. In *Central Inland Water Transport Corporation Limited and Anr. v. Brojo Nath Ganguly and Another and Central Inland Water Transport Corporation Limited and Anr. v. Tarun Kanti Sengupta and Anr.* (Supra) a Division Bench of this Court has struck down a similar rules in so far as it authorized termination of employment by serving a notice thereunder as being violative of article 14 of the Constitution of India, *inter alia*, in as much as it was capable of being selectively applied in a vicious manner by recourse 'to pick and choose' formula.

5. There is, under the circumstances, no escape from the conclusion that Rule 31 (v) of the aforesaid IIRC rules which provides for termination of



the services of the employees of the respondent corporation simply by giving 90 days' notice or by payment of salary for the notice period in lieu of such notice, deserves to be quashed. As the occasion so demands, we feel constrained in place in focus and highlight an important dimension of the matter. The impugned regulation is extremely wide in its coverage in the sense that it embraces the 'blue collar' workmen, the 'white collar' employees' as also the 'gold collar' (managerial cadre) employees of the Undertaking. In so far as the 'blue collar' and 'white collar' employees are concerned, the quashing does not pose any problem. In so far as the 'gold collar' (managerial cadre) employees are concerned, the consequence of quashing of the regulation calls some reflection. In the private sector, the managerial cadre of employees is altogether excluded from the purview of the Industrial Disputes Act and similar labour legislations. The private sector can cut the dead wood and can get rid of a managerial cadre employee in case he is considered to be wanting in performance or in integrity. Not so the public sector under a rule similar to the impugned rule. Public sector undertakings may under the circumstances be exposed to irreversible damage at the hands of a 'gold collar' employee (belonging to a high managerial cadre) on account of the faulty policy decisions or on account of lack of efficiency or probity of such an employee. The very existence of the undertaking may be endan-

gered beyond recall. Neither the capitalist world nor the communist world (where an employee has to face a death sentence if a charge of corruption is established) feels handicapped or helpless and countenances such a situation. Not being able to perform as per expectation or failure to rise to the expectations or failure to measure up to the demands of the office is not misconduct. Such an employee cannot thus be replaced at all. If this situation were to be tolerated by an undertaking merely because it belongs to the public sector, it would be most unfortunate not only for the undertaking but also for the Nation. The public sector is perched on the commanding heights of the National Economy. Failure of the public sector might well wreck the National Economy. On the other hand, the success of the public sector means prosperity for the collective community (and not for an individual Industrial House). The profits it makes in a unit can enable it to run a losing unit as also to develop or expand the existing units and start new units so as to generate more employment and produce more goods and services for the community. The public sector cannot therefore be encumbered with unnecessary shackles or made lame. It is wondered whether such a situation can be remedied by enacting a regulation permitting the termination of the employment of employee belonging to higher managerial cadre, if the undertaking has reason to believe, that his performance is unsatisfactory.



inadequate, or there is a bonafide suspicion about his integrity, these being factors which cannot be called into aid subject him to a disciplinary proceeding. If termination is made, under such rule or regulation, perhaps it may not attract the vice of arbitrariness or discrimination condemned by Articles 14 and (1) of the Constitution of India, in much as the factor operating in the case of such an employee will place him in a class by himself and the classification would have sufficient nexus with the object sought to be achieved. Of course it is for the concerned authorities to tackle the sensitive problem after due deliberation. We need say no more.

6. Time is now ripe to turn to the next question as to whether it is obligatory to direct reinstatement when the concerned regulation is found to be void. In the sphere of employer-employee relations in Public Sector Undertakings, to which Article 12 of the Constitution of India is attracted, it cannot be posted that reinstatement must invariably follow as a consequence of holding that an order of termination of service of an employee is void. No doubt in regard to 'blue collar' workmen and 'white collar' employees other than those belonging to the managerial or similar high level cadre, reinstatement would be a rule, and compensation in lieu thereof a rate exception. In so far as the high level managerial cadre is concerned, the matter deserves to be viewed from an altogether different perspective larger perspective which must take in

to account the demands of National Interest and the resultant compulsion to ensure the success of the public sector in its competitive co-existence with the private sector. The public sector can never fulfil its life-aim or successfully vie with the private sector if it is not managed by capable efficient personnel with unimpeachable integrity and the requisite vision who enjoy the fullest confidence of the 'policy makers' of such undertakings. Then and then only can public sector undertaking achieve the goals of.

- (1) maximum production for the benefit of the community,
- (2) social justice for workers, consumers and the people, and.
- (3) reasonable return on the public funds invested in the undertaking.

7. It is in public interest that such undertakings or their Board of Directors are not compelled and obliged to entrust their managements to personnel in whom, on reasonable grounds, they have no trust or faith and with whom they are in a bonafide manner unable to function harmoniously as a team working arm-in-arm with success in the aforesaid three dimensional sense of their common goal. These factors have to be taken into account by the Court at the time of passing the consequential order, for the Court has full discretion in the matter of granting relief, and the Court can sculpture the relief to suit the needs of the matter at hand. The Court, if satis-



fied that ends of justice so demand, can certainly direct that the employer shall have the option not to reinstate provided the employer pays reasonable compensation as indicated by the Court.

8. So far as the facts of this case are concerned, we are satisfied that this is a fit case for granting compensation in lieu of reinstatement, instead of granting 'reinstatement'. For, it cannot be said that the apprehension voiced by the respondent-Cooperation as regards the negative consequences of reinstatement is unreasonable. We do not propose to pronounce on the validity or otherwise of the allegations and counter allegations made by the parties in their respective affidavits. Suffice it to say that the relations between the parties appear to have been strained beyond the point of no return. The Trade Union of the employees has lodged a strong protest and even held out a threat of strike, in the context of some acts of the Appellant. Such unrest among the workmen is likely to have a prejudicial effect on the working of the undertaking which would prima facie be detrimental to the large National interest not to speak to detriment to the interest of concerned undertaking. We are not impressed by the submission that the Union is virtually a 'company's Union'. In any case such disputed questions of facts cannot be resolved in this forum. We are prima facie satisfied that the apprehension is not ill founded. What is more, reinstatement is perhaps not even in the interest of the appellant as he cannot give his best in the less than cordial atmosphere

and it will also result in misery to let alone the other side. Neither the undertaking nor the appellant can improve their image or performance, or, achieve success. In fact it appears to us that both sides will be unhappy and miserable. These are valid reasons for concluding that compensation in lieu of reinstatement, and not reinstatement, is warranted in the circumstances of the present case.

9. Counsel for the appellant having forcefully pressed the claim for reinstatement, has contended that in the event the Court is disinclined to order reinstatement, the appellant ought to be awarded the full salary and allowances which would have accrued to him till the date of his superannuation which is more than 8 years away. We think it would be unreasonable to award 8 years' salary and allowances, as lump sum compensation in lieu of reinstatement. We consider it unreasonable in the present cause—

- (i) To do so would tantamount to paying to the appellant Every Month 20% Over and Above what he would have earned if he was continued in service Without Doing Any Work as a lump sum payment of 8 years' salary invested at 15% interest (it being the current rate of interest) would yield a monthly recurring amount equivalent to his current monthly salary 'plus' 20%.
- (ii) To do so would be tantamount to



**M. P. Thakkar**  
**Judge**  
**Supreme Court of India**

to paying to him his present salary etc. plus 20% more even month not only till his date of retirement but till his death (if he lives longer) and also to his heirs thereafter; in Perpetuity.

- (iii) Besides, the corpus of the lumpsum amount so paid as compensation would remain with him intact.

Obvious it is, therefore, that the court would be conferring a 'bonanza' on him and not compensating him by accepting this formula. The submission, accordingly deserves to be repelled unhesitatingly.

10. In our considered opinion, compensation equivalent to 333 years, salary (including allowances as admissible) on the basis of the last pay and allowances drawn by the appellant would by a reasonable amount to award in lieu of reinstatement taking into account the following factors viz.—

- (1) The corpus if invested at the prevailing rate of interest (15%) will yield 50% of the annual salary and allowances. In other words every year he will get 50% of what he would have earned by way of salary and allowance with four additional advantages :

- (i) He will be getting this amount without working.
- (ii) He can work somewhere else and can earn annually what-

ever he is worth over and above, getting 50% of the salary he would have earned.

- (iii) if he had been reinstated he would have earned the salary only upto the date of superannuation (upto 55, 58 or 60 as the case may be) unless he died earlier. As against this 60% he would be getting annually he would get not only beyond the date of superannuation, for his lifetime (if he lives longer), but even his heirs would get it in perpetuity after his demise.

- (iv) The corpus of lumpsum compensation would remain intact, in any event.

No doubt—he will not have the advantage of further promotion, but then what are his prospects, given the present relationship? Besides, the chances of promotion can be set off against the risk of a departmental disciplinary proceeding. Factors (i), (ii), (iii) and (iv) are of such great significance that compensation on the basis of 50% of his annual salary and allowances is much more to his advantage, we are thus satisfied that compensation in lieu of reinstatement on the aforesaid basis is more than reasonable. We, therefore, direct that.

1. The Respondent Corporation shall reinstate the appellant with full back-wages (including usual allowances), or, at its option,

- II. The Respondent Corporation shall pay to the appellant—



- (1) Salary including usual allowances for the period commencing from the date of termination of his service under the impugned order till the date of payment of compensation equivalent to 3.33 years' salary, including usual allowances to him.
  - (2) Provident Fund amount payable to the appellant and retirement benefits computed as on the date of payment as per clause I shall be paid to him within 3 months for the said date.
- III. The appellant shall vacate and make over possession of the premises provided to the appellant by the respondent company before the expiry of 3 months from the date of this order or within one month of the day on which payment under clause II is made, whichever is later.
- iv. Respondent shall pay the costs to the Appellant.
  - v. Interim order shall stand vacated subject to the direction embodied in Clause III.
  - vi. Since the amount is being paid in one lump sum, it is likely that the employer may take recourse to Section 192 of the Income tax Act, 1961 which provides that any person responsible for paying any income chargeable under the

head 'Salaries' shall, at the time of payment deduct income tax on the amount payable at the average rate of income computed on the basis of rates in force for the financial year in which the payment is made, on the estimated income of the assessee under that head for the financial year. Therefore, the employer proposes to deduct Income-tax as provided by Section 192, and would like to make it abundantly clear that the appellant would be entitled to relief under Section 89 of the Income tax Act which provides that where by reason of any portion of assessee's salary being paid in arrears or in advance by reason of his having received in any one financial year salary for more than 12 months or a payment which under the provisions of clause (3) of Section 17 is a profit in lieu of salary, his income is assessed at a higher rate than that it would otherwise have been assessed at, the Income tax Officer shall on an application made to him in this behalf grant such relief as may be prescribed. The prescribed relief is set out in Rule 21-A of the Income-tax Rules. The appellant is entitled to relief under Section 89 because compensation here awarded includes salary which has in arrears as also the



**M. P. Thakkār**  
**Judge**  
**Supreme Court of India**

compensation in lieu of reinstatement and the relief should be given as provided by Section 89 of the Income-tax Act read with Rule 21-A of the Income tax Rules. The appellant is indisputably entitled to the same. If any application is required to be made, the appellant may

submit the same to the competent authority and the Corporation shall, through its Tax-Consultant, assist the appellant for obtaining the relief.

The appeal is allowed. The order of the High Court is set aside. Order in the aforesaid terms is passed.

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IT IS THE ESSENCE OF DEMOCRACY  
TO OBEY  
NO MASTER BUT THE LAW



**R. S. Pathak**  
**Judge**  
**Supreme Court of India**

### OBSERVATION

**Constitution of India, Art. 311 (2),—Termination of service of temporary Sub Inspector of Police - Order based on mere allegations and on unspecific and vague grounds—Order liable to be quashed, Decision of Allahabad High Court Reversed. (Termination of Service - Unspecific and vague grounds).**

### OBSERVED BY

Mr. R. S. Pathak, Mr. D. P. Madon  
 and Mr. M. P. Thakkar  
 Hon'ble Judges, Supreme Court of India.

### IN

Civil Appeal No. 621 (N) of 1975 decided on 9-11-1984, in the case of Nepal Singh, Appellant v. State of U. P. and others, Respondents.

### TEXT

Pathak, J.:—This appeal by special leave is directed against the judgement and order of the Allahabad High Court dismissing the appellant's writ petition against an order terminating his services.

2. The appellant, Nepal Singh, was employed in a temporary capacity as Sub-inspector of Police. He was serving at Shahjahanpur in 1968 when the Superintendent of Police, Shahjahanpur initiated disciplinary proceedings under S. 7 of the police Act against him on the charge that while posted at Pithoragarh he had, in November, 1964, contracted a second marriage while his first wife was alive, and as this was done without obtaining the prior permission of the Government the appellant had violated Rule 29 of the U. P. Government Servants' Conduct

Rules, 1956. The appellant filed a reply and denied the charge. The oral testimony of about twelve witnesses for the prosecution and an almost equal number for the defence was recorded. But in January, 1970 the Superintendent of Police, Shahjahanpur wrote to the Deputy inspector General of Police, Bareilly Range that as the act alleged against the appellant related to the district of Pithoragarh the disciplinary proceedings taken by him would be without jurisdiction unless there was an existing order transferring the proceedings from pithoragarh to Shahjahanpur. Accordingly on March 12, 1970, the Deputy Inspector General of Police, Bareilly Range ordered the quashing of the disciplinary proceedings. It appears that no further action was taken and the proceedings were dropped.



3. About this time the Inspector General of Police, Uttar Pradesh issued a circular letter to the Superintendents of Police throughout the State requiring them to submit a list of Sub-Inspectors who fell in any of the following three categories :

“1. Whose reputation and integrity is very low and/or.

2. Who are generally involved in scandals, like drinking, immorality, etc. which blackens the face of the U. P. Police, and/or.

3. Everywhere they are a big problem because they encourage gambling, excise offences, brothels, criminals, etc.

4. The Superintendent of Police, Shahjahanpur drew up a list of such Sub-Inspectors on February 5, 1970 and directed them to appear before the Deputy Inspector General of Police, Bareilly Range on February 10, 1970 during his inspection of the district. The list included the name of the appellant with the note :

“A corrupt Officer, who is not straight-forward, Married two wives against Government Servants' Conduct Rules, Does not do his duty sincerely. Wherever he goes creates problems.”

5. Thereupon, on April 27, 1970 the Deputy Inspector General of police, Bareilly Range, made an order purporting to be under the rules published by Notification. No. 230/II.B-1953 dated January 30, 1953 that the appellant's services were not required any more and were terminated with one month's pay in lieu of notice.

6. The appellant filed a writ peti-

tion in the High Court against the order terminating his services and on November 17, 1972 a learned single Judge of the Allahabad High Court dismissed the writ petition holding that the order of termination passed bona fide, that it was an order of termination simpliciter and that it did not constitute the removal of the appellant from service. That view was endorsed, on appeal filed by the appellant, by a Division Bench of the High Court by its judgement and order dated March 13, 1973. The learned judges have taken the view that the case in respect of the appellant was covered by the first and third of the three categories enumerated earlier, that is to say, his integrity was low and he was a problem officer “who encouraged gambling, excise offences, brothels, criminals, etc.” The allegation that he had married two wives against the Government Servants' Conduct Rules, 1956, the learned Judge said, did not bring him within any of the three categories as, in their view, the second marriage without prior permission of the Government gave rise merely to a technical charge. In view of the opinion that the impugned order was *facie* innocuous and could not be said to cast any stigma or be regarded as imposing the punishment of dismissal or removal, the learned Judges dismissed the appeal.

7. It seems to us that the High Court has failed to consider the true content of the case set up by the appellant. The entire thrust of the appellant's case is that in terminating the appellant's services the competent authority



**R. S. Pathak**  
**Judge**  
**Supreme Court of India**

ed him unfairly and arbitrarily. It is well settled that in dealing with a Government servant the State must conform to the constitutional requirements of Arts. 14 and 16 of the Constitution. An arbitrary exercise of power by the State violate those constitutional guarantees, for a fundamental violation in the guarantee of equality of protection against discrimination is that fair and just treatment will be accorded to all, whether individually or collectively as a class. When a Government servant satisfies the Court prima facie that an order terminating his services violates Arts. 14 and 16, the competent authority must discharge the burden of showing that the power to terminate the services was exercised honestly and in good faith, on valid considerations, fairly and without discrimination.

8. The High Court has observed that within the framework of the three categories defined in the Inspector General's circular the allegation of a second marriage by the appellant was of no significance, and that the principal intent in terminating the appellant's services was to rid the State of an unsuitable officer. The Superintendent of Police has stated that the appellant created problems wherever he went, but it is not disclosed in the affidavits what were these "Problems". It is not shown that the problems were of the nature specifically indicated by the circular issued by the Inspector General of Police. We are unable to conclude from material before us that the Superintendent of Police

applied his mind to the requirements of the case.

9. The Superintendent of Police has also commented that the appellant was a corrupt officer who was not straight forward (whatever that might mean). On that we have this to say. Where the services of a Government servant on temporary appointment are terminated on the ground that his reputation for corruption makes him unsuitable for retention in the service, the reputation for corrupt behaviour must be based on something more than a mere allegation. The other grounds mentioned in the report of the Superintendent of Police, which impressed the High Court, appear to us to be equally vague and unspecific. The State, and for that matter any statutory employer, must take great care when proceeding to terminate a career on the ground of unsuitability, to ensure that its order is founded in definable material objectively assessed and relevant to the ground on which the termination is effected.

10. Proceeding from there, we may advert to a further aspect of the case. It would seem that the dominating factor which influenced the mind of the Deputy Inspector General of Police was the allegation that the appellant had married a second wife against the Government Servants' Conduct Rules. It is clear that a fullfledged enquiry was instituted into the matter, evidence was recorded but before any findings could be rendered the enquiry was dropped for want of jurisdiction. No



attempt was made thereafter to institute a proper enquiry by the appropriate authority. In the circumstances, it was not open to the Superintendent of Police to mention in his report, as a statement of fact, that the appellant had married a second time against the Government Servants' Conduct Rules. With the dropping of the enquiry the allegation remained unverified. We may observe that where allegations of misconduct are levelled against a Government servant, and it is a case where the provisions of Art. 311 (2) of the Constitution should be applied, it is not open to the competent authority to take the view that holding the enquiry contemplated by that clause would be a bother or a nuisance and that therefore it is entitled to avoid the mandate of that provision and resort to the guise of an ex facie innocuous termination order. The Court will view with great disfavour any attempt to circumvent the constitutional provision of Art. 311

(2) in a case where that provision comes into play.

11. For all the aforesaid reasons we are unable to uphold the judgment and order of the High Court, and as the result the appeal must be allowed.

12. The appeal is allowed and the order dated April 27, 1970 of the Deputy Inspector General of Police, U.P. Bareilly Circle is quashed. The appellant is entitled to be treated as continuing in service without interruption. It will be open to the authorities to take fresh proceedings against the appellant in accordance with law. It will also be open to them to determine whether the appellant was fully employed for the purpose of considering the extent of relief, if any, which he may be entitled pursuant to our present order quashing the impugned order. In the circumstances, there is no order as to costs.

Appeal allowed



**R. S. Pathak**  
**Judge**  
**Supreme Court of India**

### OBSERVATION

**Constitution of India, Arts. 14, 16 and 311—Promotion—Classification—**  
**opening of separate avenue of promotion on temporary basis only for those**  
**Upper Division Clerks and Selection Grade Clerks in A G's office who had put**  
**20 years of service and exhausted all chances of appearing at Subordinate**  
**Accounts Service examination or had become ineligible to appear at it—Classi-**  
**fication is reasonable. (Public Servant—Promotion classification).**

### OBSERVED BY

Mr. R. S. Pathak and  
 Mr. V. Balakrishna Eradi  
 Hon'ble Judges, Supreme Court of India

### IN

Civil Appeal No. 1033 of 1979 decided on 13-11-1984, in the case of Debranjy  
 and others, Appellants v. Comptroller and Auditor General of India and others,  
 respondents.

### TEXT

R. S. Pathak, J. :— This appeal by  
 Special leave raises an interesting ques-  
 tion respecting the recruitment of Upper  
 Division Clerks for appointment as Ac-  
 countants in the office of the Accountant  
 General, West Bengal.

2. It appears that at one time all  
 holders of supervisory posts in the office  
 of the Accountant General, West Bengal  
 were required to pass the Subordinate  
 Accounts Service Examination. The  
 examination consisted of two parts.  
 Every eligible employee was entitled to  
 three chances to pass the Part I examina-  
 tion and having passed that he had to  
 pass the Part II examination before he  
 reached the age of 45 years. In 1966  
 Comptroller and Auditor General

of India considered it necessary to take  
 measures for improving the working  
 of the offices of the Civil Accountants  
 General because it had been reported  
 by the Directors of Inspection that the  
 accounting-cum-administrative work was  
 suffering considerably and the quality  
 of local inspection was poor. It was  
 also felt that some accounting-cum-ad-  
 ministrative supervisory posts could be  
 filled by clerks who had not been  
 able to pass the Subordinate Accounts  
 Service but who had long years of ex-  
 perience and a good record of service  
 and possessed sufficient administrative  
 ability. It was expected that while this  
 measure would afford an avenue of pro-  
 motion to Upper Division Clerks who



had no hope of entering the regular channel of promotion through the subordinate Accounts Service examination, it would release more Subordinate Accounts Service accountants for inspection work and other important assignments requiring greater technical knowledge and application. Accordingly, a scheme was framed by an Office Order No. IM 96 dated June 8, 1966 for filling up some of the posts of a purely accounting cum-administrative nature by Upper Division Clerks (including Selection Grade Clerks) who were not members of the Subordinate Accounts Service. They were to be known as Accountants. This was to be effected without reducing the total number of existing posts for which the Subordinate Accounts Service men were eligible. The scheme provided that in view of the acute shortage of Subordinate Accounts Service personnel for intensive local audit of a large number of schemes and programmes then in operation the offices would be reorganised in such a way that passing the Subordinate Accounts Service Examination would not be a necessary qualification for holding supervisory posts where the work involved was entirely of an accounting-cum-administrative nature and the knowledge of rules and accounts of a very high standard was not required. It was stipulated that Upper Division Clerks and Selection Grade Clerks who had not passed the Subordinate Accounts Service Examination should be taken on the basis of their experience, administrative ability and a good record. There was no reservation of posts for those Clerks. The scheme only

made them eligible for holding those posts. To be eligible the Upper Division Clerks and Selection Grade Clerks should have put in not less than ten years of service in the Upper Division Clerical Cadre and should have exhausted all chances of appearing in the Subordinate Accounts Service Examination or by reason of being over 45 years of age were no longer eligible to appear at the Subordinate Accounts Service Examination. The appointments were temporary and their continuance would depend upon the satisfactory performance of their duties assessed on the basis of six monthly reports. It was made clear that they would not be eligible for promotion as Assistant Accounts Officers. It seems that a fair number of such appointments were made with effect from June 15, 1966 by the Accountant General, West Bengal by his letter No. A MN/37 dated June 9, 1966.

3. The appellants who had originally been appointed as Upper Division Clerks in the office of the Accountant General, West Bengal and at the relevant time were permanent Selection Grade Clerks on their reversion from temporary appointments. Clerks-in-charge in different sections of the office of the Accountant General, West Bengal, filed a writ petition challenging the appointments under the scheme alleging that they were entitled to be considered for appointment to those posts. They contend that in confining the zone of eligibility to Upper Division Clerks who



It passed the Subordinate Accounts Service Examination the scheme brought about an invidious discrimination which is violative of Arts. 14 and 16 of the Constitution.

4. By his judgement and order dated June 2, 1970 a learned single Judge of the Calcutta High Court allowed the writ petition and quashed the scheme. An appeal by the Comptroller and Auditor General of India was allowed by a Division Bench of the High Court by its judgement and order dated July 6, 1978. It set aside the judgement of the learned single Judge and dismissed the writ petition.

5. Before us, learned counsel for the appellant raised substantially the same point which was pressed before the High Court in the writ petition. The principal contention is that the scheme violates Arts. 14 and 16 of the Constitution because in defining the conditions of eligibility there is no reasonable basis for discriminating between those who can no longer appear at the Subordinate Accounts Service Examination and those who can still do so.

6. It is evident that the scheme was intended to provide a separate avenue of promotion for those Upper Division Clerks who had put in 20 years of service or more in their cadre and who had exhausted all their chances of appearing at the Subordinate Accounts Service Examination for promotion to supervisory posts, or who having crossed the age of 45 years, were no longer eligible to appear at that

Examination. These indicia distinguished that category of Upper Division Clerks from others. The entire purpose of the scheme was to provide an avenue of promotion for those Upper Division Clerks who because they were no longer eligible to appear at the Subordinate Accounts Service Examination would be compelled otherwise to stagnate in their existing cadre. An incentive was thus provided to them. There was the hope that efficiency and industry in their present posts would be rewarded by promotion. If the scheme had been thrown open to Upper Division Clerks who still enjoyed the possibility of recruitment to the Subordinate Accounts Service, the intent underlying the scheme would have been defeated. The appellants, a though senior in length of service to the respondents promoted under the scheme, were still eligible to appear in the Subordinate Accounts Service Examination and the opportunity of advancement in their regular promotional channel was still available to them. It may be observed that promotion under the scheme was purely temporary and further continuance on the promotional post depended upon the satisfactory performance of duties monitored every six months. They were barred from promotion as Assistant Accounts Officers, and therefore after promotion to the supervisory posts of Accountants under the scheme they were not entitled to further advancement or promotion to any higher post. On the other hand, the appellants, in the event of their success at the Subordinate Accounts



Service Examination, were entitled to substantive appointment by promotion to supervisory posts, and thereafter eligible for further promotion to still higher posts. We are satisfied that in providing a separate channel of promotion governed by its own conditions of eligibility the impugned scheme follows a clearly defined classification having a reasonable nexus to the object of the classification. Those who fall outside the scheme cannot complain of discrimination, for intelligible differentia exists between those included within the scheme and those outside it. The framing and implementation of such a scheme

falls within the scope of administrative policy, and having regard to the object underlying the scheme as well as a careful definition we see no basis for the complaint by the appellants.

7. Our attention was invited by learned counsel for the appellants to *State of Jammu and Kashmir v. Triloki Nath Khosa* (1974) 1 SCR 771 : (AIR 1974 SC 1) but learned counsel has been unable to show how that case is relevant to the facts of the instant case.

8. The appeal fails and is dismissed but, in the circumstance there is no order as to costs.

Appeal dismissed



## OBSERVATION

**Constitution of India, Art 136 —Service matter—Dismissal of petitioner employee on grounds of misconduct —Petitioner shown to be guilty of suppression of material fact which would weigh with any employer in giving him employment —held case did not merit consideration under Art. 136.**

**(B) Industrial Disputes Act (14 of 1947), Sch. 2 Items 1, 3, 6—Dismissal of employee for misconduct Suppression of material fact in application for employment alleged to be misconduct—Alleged misconduct not falling within the enumerated misconducts in service regulations or standing orders—Order is illegal.**

## OBSERVED BY

Mr. D. A. Desai and

Mr. Ranganath Misra

Hon'ble Judges, Supreme Court of India

## IN

Spl. Leave Petn. (Civil) No. 5523 of 1984, decided on 14-1-1985, in the case of Rasiklal Vaghajibhai Patel, Petitioner v. Ahmedabad Municipal Corporation and another, Respondents.

## TEXT

Dasai, J.—Petitioner is shown to be guilty of suppression of a material fact which would weight with any employer in giving him employment and therefore, the case of the petitioner does not merit consideration under Art. 136 of the Constitution and his petition for special leave to appeal against the decision of a Division Bench of the Gujarat High Court in Special Application No. 4649 of 1981 date November 28, 1983 must accordingly fail but this short epistle became a compelling necessity in view of the statement of law appearing in the judgement of the High Court which if permitted to go uncorrected, some innocent person may suffer in fu-

ture This is the only justification for this short order.

2. The petitioner on his application was recruited in the Sales Tax Department on September 30, 1950 and at the relevant time he was working as Sales Tax Inspector. By an order dated January 31, 1964 of the Commissioner of Sales Tax, Gujarat State, the petitioner who was at the relevant time working as Sales Tax Inspector was charged with misconduct of gross negligence and acting with gross impropriety in demanding illegal gratification, and as these charges were held proved, the Commissioner of Sales Tax imposed a penalty of removal from service. This is not in dis-



pute and therefore it can be safely stated that the petitioner was removed from the service of the Sales Tax Department on account of the proved misconduct.

3. After being removed from the Sales Tax Department, the petitioner joined service in Bhatka Vallabh Dhola College, Ahmedabad ('college' for short) on May 15, 1964. While continuing his service with the college, the petitioner applied on January 13, 1968 for the post of Head-Clerk with Ahmedabad Municipal Corporation. The application had to be made in the prescribed form, Column No. 14 of which required the applicant to state whether the applicant had been removed from service and if so, reasons for removal and if the applicant had voluntarily left previous service, reasons for leaving the service should be stated. While answering this column, the petitioner stated that he had served in the Sales Tax Department from September 30, 1959 to January 31, 1964 and that he has resigned from service due to transfer. It thus appeared that the petitioner was guilty of suppress veritas and suggestio falsi inasmuch as he suppressed the material fact that he was removed from service on the ground of proved misconduct and that he made a false suggestion that he had voluntarily left service because of transfer. Ultimately when these facts came to light, he was charge-sheeted and removed from service. A petition to the Labour Court was rejected on the ground that the misconduct alleged against the petitioner is proved. His writ petition to the High Court proved unsuccessful. Hence

he filed this petition for special leave.

4. The High Court while dismissing the petition held that even if the allegation of misconduct does not constitute misconduct amongst the enumerated in the relevant service regulations yet the employer could attribute what would otherwise possibly be a misconduct though not enumerated and punish him for the same. This proposition appears to us to be startling because even though either under the Certified Standing Orders or service regulations. It is necessary for the employer to prescribe what would constitute the misconduct so that the workman or employee knows the pitfall he should guard against. If after undergoing the elaborate exercise of enumerating misconduct, it is left to the unbribed discretion of the employer to dub any conduct as misconduct, the workman will be on tenterhooks and he will be punished by ex post facto determination by the employer. It is a well settled canon of penal jurisprudence that removal or dismissal from service on account of misconduct constitutes penalty in law and that the workmen sought to be charged for misconduct must have adequate advance notice of what action or what conduct would constitute misconduct. The legal proposition stated by the High Court would have necessitated in depth examination, but for a recent decision of this Court in *Glaxo Laboratories v. Presiding Officer, Labour Court, Meerut* (1984) 1 SCR 230 in which this Court specifically repelled an identical contention advanced by M



Shanti Bhushan, learned counsel who appeared for the employer in that case serving as under:

“Relying on these observations, Shanti Bhushan urged that this Court has in terms held that there can be some other misconduct not enumerated in the standing order and for which the employer may take appropriate action. This observation cannot be viewed divorced from the facts of the case. What transpired in the face of the court in that case was that the employer had raised a technical objection ignoring the past history of litigation between the parties. That application under Sec. 33A was not maintainable. It is in this context that this Court observed that the previous standing order might have been the outcome of some misconduct not enumerated in the standing order. But the extracted observation cannot be elevated to a proposition of law that some misconduct neither defined nor enumerated and which may be believed by the employer to be misconduct ex post facto would expose the workman to a penalty. The law will have to move two centuries backward to accept such a construction. But it is not necessary to go so far because in *Salem Road Electricity Distribution Co. Ltd. v. Their Employees Union* (1966) 2 SCR 98, this Court in terms held that the object underlying the Act was to introduce uniformity of terms and conditions of employment in respect of workmen belonging to the same category and discharging the same or similar work

under an industrial establishment, and that these terms and conditions of industrial employment should be well-established and should be known to employees before they accept the employment. If such is the object, no vague undefined notion about any act, may be innocuous, which from the employer's point of view may be misconduct but not provided for in the standing order for which a penalty can be imposed, cannot be incorporated in the standing orders. From certainly of conditions of employment, we would have to the days of hire and fire which reverse movement is hardly justified. In this connection, we may also refer to *Western India Match Co. Ltd. v. Workmen* (1947) 1 SCR 434 in which this Court held that any condition of service if inconsistent with certified standing orders, the same would not prevail and the certified standing orders would have precedence over all such agreements. There is really one interesting observation in this which deserves noticing. Says the Court :

“In the sunny days of the market economy theory people sincerely believed that the economic law of demand and supply in the labour market would settle a mutually beneficial bargain between the employer and the workman. Such a bargain, they took it for granted, would secure fair fair terms and conditions of employment to the workman. This law they venerated as natural law. They had an abiding faith in the verity of this law. But the experience of the



working of this law over long period has belied their faith."

Lastly we may refer to *Workmen of Lakheri Cement Works Ltd. v. Associated Cement Companies Ltd.* (1970) 20 Fac LR 243. This Court repelled the contention that the Act must prescribe the minimum which has to be prescribed in an industrial establishment, but it does not exclude the extension otherwise. Relying upon the earlier decision of this Court in *Rohtak Hissar District Electricity supply Co. Ltd. v. State of Uttar Pradesh* (1966) 2 SCR 863 the Court held that everything which is required to be prescribed with precision and no argument can be entertained that something not prescribed can yet be taken into account as varying what is prescribed. In short it cannot be left to the vagaries of management to say ex post facto that some acts of omission or commission nowhere found to be enumerated in the relevant standing order is nonetheless a misconduct not strictly falling within the enumerated misconduct in the relevant standing order but yet a misconduct for the purpose of imposing a penalty. Accordingly, the contention of Mr. Shanti Bhushan that some other act of misconduct which would per se be an act of misconduct though not enumerated in S. O. 22 can be punished under S. O. 23 must be rejected. It is thus well-settled that

unless either in the Certified Standing Order or in the service regulation act or omission is prescribed as misconduct, it is not open to the employer to fish out some conduct as misconduct and punish the workman even though alleged misconduct would not be comprehended in any of the enumerated conduct.

5. The High Court fell into error when it observed that :

"The conduct of the petitioner in suppressing the material facts and misrepresenting his past on the material aspect cannot be said to be a good conduct. On the contrary it is unbecom- of him that he should have deliberately suppressed the material fact and to obtain employment by deceiving the Municipal Corporation. It is clear misconduct."

After thus holding that the suppression of material facts and suggestion of false facts would constitute misconduct, the High Court held that even if it does not fall in any of the enumerated misconducts, yet for the purpose of service regulation, it would nonetheless be a misconduct punishable as such. We are unable to accept this view of law and it has to be rejected.

6. Having clearly restated the position, we reject this special leave petition.

Special leave petition dismissed.



V. D. Tulzapurkar  
Judge  
Supreme Court of India

### OBSERVATION

**Court act Work—Contract Act (9 of 1972), Ss. 55, 73 Constitution of India, Art. 299—Govt. Contract—Work to be completed within one year—Contractor requested to spread over work for two years or more due to less budget provision—Contractor not intimated by Govt. regarding extra payment—Contractor on completion of work can be granted extra payment at increased rates.**

### OBSERVED BY

Mr. V. D. Tulzapurkar and  
Mr. V. Khalid  
Hon'ble Judges, Supreme Court of India

### IN

Civil Appeal No. 316 (N) of 1971 decided on 6-2-1985, in the case of Hyderabad Municipal Corporation, Appellant v. M. Krishnaswami Mudaliar and another, Respondents.

### TEXT

**Judgement :—**The only question vehemently argued by counsel for the appellant in this appeal was that the respondent plaintiff was not entitled to claim 20 per cent extra over and above the rates originally agreed upon between the parties under the suit contract Ex. A-1.

2. Under Ex. A-1 drainage works for CSIR Laboratory at Uppal was entrusted to the respondent-plaintiff and under the terms of the contract the work was to be completed by the plaintiff within a period of one year, i. e., from 5th March 1951 to 25th March 1952. Admittedly at the instance of the Executive Engineer P. W. D. due to financial difficulties less budget having been provided for in the year 1951-52 the plaintiff was requested to spread over the work for two years more, that is to say

to complete the same in three years but the respondent plaintiff was agreeable to spread over the work for two years more as suggested on condition that extra payment will have to be made to him in view of increased rates of either material or wages. The Government did not intimate to the respondent plaintiff that no extra payment on account of increased rates would be paid to him or that he will have to complete the work on the basis of original rates. In fact no reply was sent by the Government and a studied silence was maintained by the Government in regard to the respondent-plaintiff's demand for extra payment, in spite of several reminders in that behalf, till the plaintiff actually completed the work during the spread over period and only when after completion of work the plaintiff-respon-



dent submitted his final bill claiming 20 per cent extra over and above the rates originally agreed upon between the parties the Government stated that he was not entitled to increased rates. After considering the correspondence exchanged between the parties and the other material on record the High Court has taken the view that the government was liable to make extra payment for the work done as there was no dispute that the rates of material, etc. had increased during the extended period of two years and plaintiff was entitled to such extra payment. After considering the relevant material on record we are of the view that both in enquiry and in law the plaintiff contractor is entitled to receive extra payment and the High Court was right in deciding the question in respondent-plaintiff's favour. Since subsequent to the entering into the agreement Ex. A-1 the Drainage Division was transferred from P. W. D. to Hyderabad Municipal Corporation the liability to make this extra payment in our view has been properly saddled on the appellant Corporation.

3. The other point which was

faintly urged by counsel for the appellant was in regard to interest claimed by respondent plaintiff on the balance of amount due to him but which had wrongly been retained by the Department. Counsel urged that under clause 27 of the contract it was provided that "the contractor shall not be entitled to interest upon any payments in arrears or upon any balance which may on final settlement of his accounts be found due to him". In our view the reliance on this clause is of no avail to the appellant for the simple reason that this clause will not be applicable provided the work was completed according to the specifications and the time schedule fixed in the original contract. Moreover in the instant case plaintiff had issued notice claiming interest under the Interest Act and the High Court has, in modification of the Trial Court's decree, awarded interest from the date of notice till payment. The claim for interest, therefore, was rightly allowed.

4. In the result the appeal is dismissed but there will be no order as to costs.

Appeal dismissed



**V. Balakrishna Eradi**  
**Judge**  
**Supreme Court of India**

### OBSERVATION

**(A) Constitution of India, Art. 311 (1)—Order of suspension passed against Government servant—Art. 311 (1) not attracted.**

**(B) Orissa Civil Services (Classification, Control and Appeal) Rules (1952) Rule 11—Forester appointed by Conservator of Forests placed under suspension by District Forest Officer—validity.**

### OBSERVED BY

Mr. D. A. Desai, Mr. A. P. Sen and  
 Mr. V. Balakrishna Eradi,  
 Hon'ble Judges, Supreme Court of India

### IN

Civil Appeals Nos. 200 (N) and 201 of 1971, decided on 22-2-1985, in the case of State of Orissa and others, Appellants, v. Shive Parashad Das, Respondent.

And

State of Orissa and others, Appellants v. Ram Prashad, Respondent.

### TEXT

Balakrishna Eradi, J :—In these two appeals filed by Special leave against two judgments of Orissa High Court the question raised is identical namely whether the order of suspension from service passed against a Government servant falls within the scope and purview of Art. 311 of the Constitution. The judgement appealed against the Civil Appeal No. 201 of 1971 is prior in point of time and in the subject-matter under challenge in C. A. No. 200 of 1971 the High Court has merely affirmed the former judgement. We shall, therefore, refer only to the facts relating to Civil Appeal No. 201 of 1971.

2. The respondent Shri Ram Prashad Das was appointed as a Forester by the Conservator of Forests, Berhampur, Dis-

trict Ganjam, on 17-7-1952. Subsequently while working as a Forester under the District Forest Officer, Ghumsur North Division the respondent was placed under suspension by an order dated 26-2-1969 passed by the said District Officer, pending enquiry into charges of negligence of duties. The respondent thereupon filed a Writ Petition in the High Court of Orissa under Art 226 of the Constitution challenging the order of suspension passed against him on the ground that it was made in contravention of Art. 311 of the Constitution as well as R. 12 of the Orissa Civil Services (Classification, Control and Appeal) Rules, 1962 (hereinafter called the 'Rules'). The High Court by its impugned allowed judgement the Writ peti-



tion and quashed the order of suspension holding the same to be in contravention of Art. 311 (1) of the Constitution. The High Court took the view that inasmuch as the respondent had been appointed as Forester by the Conservator of Forests, he could not have been validly suspended from service by the District Forest Officer, who is an authority subordinate to the Conservator of Forests. The correctness of this view taken by the High Court is called in question by the appellant—the State of Orissa—in these two appeals.

3. An order of suspension passed against a Government servant pending disciplinary enquiry is neither one of dismissal nor of removal from service within Art. 311 of the Constitution. This position was clearly laid down by a Constitution Bench of this Court in *Mohammad Ghouse v. State of Andhra*, 1957 SCR 414: It is unfortunate that this decision was not brought to the notice of the learned Judges of the High Court, Clause (1) of Art. 311 will get attracted only when a person who is a member of Civil Service of the Union or an All India Service or a Civil Service of a State or one who holds a civil post under the Union or a State is 'dismissed' or 'removed' from service. The provisions of the said clause have no application whatever to a situation where a Government Servant has been merely placed under suspension pending departmental enquiry since such action does not constitute either dismissal or removal from service. The High Court was, therefore, manifestly in error in quashing

the order of suspension passed against the respondent on the ground that it was violative of clause (1) of Art. 311 of the Constitution.

4. Rule 12 of the Rules lays down that the appointing authority or any authority to which it is subordinate or any authority empowered by the Governor or the appointing authority in that behalf may place a Government Servant under suspension, where a disciplinary proceeding against him is either contemplated or is pending. It is not in dispute that under Notification issued by the State Government for exercise of the power conferred by Rule 12 of the Rules the District Forest Officer was constituted "the appointing authority" in respect of Foresters with effect from 7-5-62. It is therefore clear that on the date on which the impugned order of suspension was passed on 26-2-1969, the District Forest Officer under whom the respondent was working in the Ghumna North Division was fully competent to pass the impugned order of suspension. Hence the High Court was perfectly correct in rejecting the further contention advanced before it by the respondent that the impugned action had been taken in violation of the provisions of Rule 12.

5. We accordingly allow this appeal. Civil Appeal No. 201 of 1971 set aside the judgement of the High Court and dismiss the Writ Petition in O.J.C. No 10 of 1971. The parties will bear their respective costs for this Court.

6. In the light of the legal



**V. Balakrishna Eradi**  
**Judge**  
**Supreme Court of India**

on enunciated above, it follows that C.A. No. 200 of 1971 has also to be allowed. The Judgement of the High Court is accordingly set aside and the Writ Petition filed by the respondent there in O.J.C. No.

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101 of 1970 will also stand dismissed. The parties will bear their respective costs in this appeal also.

Order accordingly.



**IT IS THE ESSENCE OF DEMOCRACY  
TO OBEY  
NO MASTER BUT THE LAW**



### OBSERVATION

(A) Constitution of India, Art. 311 (2) Second Proviso, Cl. (a)—Govt. servant convicted on criminal charge, released under provisions of Probation of Offenders Act—Liability to dismissal under Cl. (a) for Second Proviso to Art. 311 (2)—Does not cease by reason of Sec. 12 of Probation of Offenders Act, Section 12—(i) Probation of Offenders Act (20 of 1958), Section 12—(ii) Dismissal of Public servant—Release after conviction on criminal charge under Probation of Offenders Act).

(B) Constitution of India, Art. 311 (2), Second Proviso, Cl. (a)—Dismissal of Govt. servant on conviction of criminal charge—Power as to be exercised fairly, justly and reasonably—Dismissal Public servant—Conviction on criminal charge.

### OBSERVED BY

Mr. Y. V. Chandrachud, Mr. D. A. Desai and  
Mr. Amarendra Nath Sen  
Hon'ble Judges, Supreme Court of India

### IN

Civil Appeal No. 480 (N) of 1973, decided on 12-3-1985 in the case of Shankar vs Appellant v. Union of India and another, Respondents.

### TEXT

Chandrachud, C. J.:—Cases which evoke sympathy come frequently before the Court. But pity not often. The case before us has a unique story to tell the story of a crime committed under the stress of personal misery compounded by the apathy of the Establishment and appalling delays of law. Ironically the silver lining is furnished by the bravery of a broken man who has been fighting against injustice for the last 23 years. When justice is done or so the judges believe the conscience assuaged. In this case, despite our doing all that can be done for the appellant within the framework of law we have an uneasy conscience. Delay not only defeats justice and robs it of its imme-

diately relevance to the parties but it shakes the very confidence of the people in the desire and ability of law courts to assist them when they need that assistance most.

2. The appellant was retrenched by the Ministry of Rehabilitation, Government of India in 1960, whereupon he was employed as a Cash Clerk by the Delhi Milk Supply Scheme Department which is under the administrative control of the Government of India. In 1962 he was prosecuted for breach of trust in respect of a sum of Rs. 500/-. He repaid that amount and pleaded guilty to the charge. Accepting that plea the learned Magistrate, First Class Delhi convicted him under S. 409



of the Penal Code but in view of the peculiar circumstances relating to the crime and the criminal he released him under S. 4 of the Probation of Offenders Act, 1958. As a result of the conviction the appellant was dismissed from service summarily with effect from April 14, 1964.

3. The appellant filed a suit in 1966 in the court of the Sub-Judge, First Class, Delhi for setting aside his dismissal from service mainly on the ground that since he was released under the Probation of Offenders Act, it was not permissible to the authorities to visit him with the penalty of dismissal from service. That suit was dismissed on the ground that since the appellant was convicted of a criminal charge he was liable to be dismissed under Cl. (a) of the second proviso to Art. 311 (2) of the Constitution. The decree of the trial court was confirmed by the learned Additional Senior Sub-Judge Delhi in January 1968. The appellant filed Second Appeal No. 142 of 1968 in the High Court of Delhi which was allowed by D. K. Kanpur, J, on April 13, 1971. The learned Judge accepted the contention of the appellant that by reason of the provision contained in S. 12 of the Probation of Offenders Act he could not be dismissed from service without affording him a reasonable opportunity of being heard as required by Art. 311 (2) of the Constitution. The Government of India filed a Latters Patent Appeal against that judgement, which was allowed by Jagjit Singh and R. N. Aggarwal, JJ. on October 10, 1972. This appeal of the year 1972 has come

up for hearing in this Court more than 11 years after it was filed.

4. Section 12 of the Probation of Offenders Act must be placed out of way first. It provides that notwithstanding anything contained in any other law a person found guilty of an offence shall be dealt with under the provisions of S. 3 of the Act. S. 4 "shall not suffer disqualification attaching to a conviction for an offence under such law. The order of dismissal from service consequent upon a conviction is not a "disqualification" within the meaning of S. 12. There are statutes which provide that persons who are convicted for certain offences shall incur certain disqualifications. For example Chapter III of the Representation of the People Act, 1951, entitled "Disqualifications for membership of Parliament and State Legislatures" and Chapter IV entitled Disqualifications for Voting contain provisions which disqualify persons convicted of certain charges from being members of legislatures or from voting at elections to legislatures. This is the sense in which the word "disqualification" is used in S. 12 of the Probation of Offenders Act. Therefore, it is not possible to accept the reasoning of the learned single Judge of the Delhi High Court.

5. But though this is so the ultimate order passed by the learned single Judge has to be upheld. It can be supported on grounds other than the one on which it rests.

6. The learned Magistrate, First Class, Delhi, Shri Ambar Prakash, J,



ted with more than ordinary understanding of law. Indeed, he set an example worthy of emulation. Out of the total sum of Rs. 1,607.99 which was entrusted to the appellant as a Cash Clerk, he deposited Rs. 1,107.99 only in the Central Cash Section of the Delhi Milk Scheme. Undoubtedly he was guilty of criminal breach of trust and the learned Magistrate had no option but to convict him for that offence. But it is to be admired that long back as in 1963 when S. 235 of the Code of Criminal Procedure was not in the Statute Book and later refinements in the norms of sentencing were not even in embryo the learned Magistrate gave close and anxious attention to the sentence which in the circumstances of the case could be passed on the appellant. He says in his judgement: The appellant is a victim of adverse circumstances: his son died in February 1962, which was followed by another misfortune: his wife fell down from an upper storey and was seriously injured; it was then the turn of his daughter who fell seriously ill and that illness lasted for eight months. The learned Magistrate concluded his judgement thus :

“Misfortune dodged the accused for about a year.....and it seems that it was under the force of adverse circumstances that he held back the money in question. Shankar Dass is a middle aged man and it is obvious that it was under compelling circumstances that he could not deposit the money in question in time. He is not a previous convict. Having regard to the circumstances of the case, I am of the opinion that he should be dealt with

under the Probation of Offenders Act, 1958.”

7. It is to be lamented that despite these observations of the learned Magistrate the Government chose to dismiss the appellant in a huff without applying its mind to the penalty which could appropriately be imposed upon him in so far as his service career was concerned. Clause (a) of the second proviso to Article 311 (2) of the Constitution confers on the Government the power to dismiss a person from service “on the ground of conduct which has led to his conviction on a criminal charge”. But that power like every other power has to be exercised fairly, justly and reasonably. Surely, the Constitution does not contemplate that a Government servant who convicted for parking his scooter in a no-parking area should be dismissed from service. He may perhaps not be entitled to be heard on the question of penalty since Cl (a) of the second proviso to Art. 311 (2) makes the provisions of that article inapplicable when a penalty is to be imposed on a Government servant on the ground of conduct which has led to his conviction on a criminal charge. But the right to impose a penalty carries with it the duty to act justly. Considering the facts of this case, there can be no two opinions that the penalty of dismissal from service imposed upon the appellant is whimsical.

8. Accordingly we allow this appeal set aside the judgement of the Delhi High Court dated October 10, 1972 and direct that the appellant shall be reinsta-



ted in service forthwith with full back wages from the date of his dismissal until re-instatement. The Government of India will pay to the appellant the costs of the suit, the First Appeal, the Second Appeal the Letters Patent Appeal and of this appeal which we quantify at Rupees five thousand. The appellant will report for duty punctually at this formerplace of work on April 1, 1985.

9. In this brief judgement we have referred to many unhappy facts. We must mention one more. We had adjour-

ned this appeal after hearing it a while in order to enable the Government to consider whether the appellant could be reinstated in service with a reasonable adjustment in the payment of back wages. The learned counsel appearing on behalf of the Union of India showed us a letter written by a Deputy Secretary stating that the Hon'ble Minister of Agriculture desired him to say that the Court should decide the case on merits. We have done our modest best in that regard.

Appeal allowed.



**R. N. Misra**  
**Judge**  
**Supreme Court of India**

### OBSERVATION

**Constitution of India, Arts. 309, 311, 32 and 16—Central Secretariat Service Rules (1962), Rr. 13, 18—Determination of seniority of Assistants—Select list for grade of Section Officers—Substantial compliance in implementing scheme under Rules—Court cannot interfere.**

### OBSERVED BY

Mr. P.N. Bhagwati, Mr. Amarendra Nath  
 Mr. A. P. Sen and Mr. Ranganath Misra  
 Hon'ble Judges, Supreme Court of India

### IN

Writ Petns. Nos. 9323 to 9333 of 1982 and 4830 of 1983, decided on 12-3-1985, in case of Karam Pal, etc. Petitioners v. Union of India and others, Respondents.

### And

Ram Sarup Kanwar, Petitioners v. Union of India, Respondents.

### TEXT

Ranganath Misra, J. : — These 12 applications under Art. 32 of the Constitution are by Assistants covered by Central Secretariat Service Rules, 1962 ('Rules' for short), and challenge the select list for the grade of Section Officers for the years 1978, 1979 and 1980 and the common seniority list dt. April 26, 1979, as also the provision-supplementary list of Assistants dated August 21, 1980. They have further prayed that the select list and seniority list be re-published on the basis of length of continuous service in the grade of Assistants and promotion to the grade of Section Officers be granted from the date when Assistants junior to them were promoted as Section Officers.

2. The Rules framed under the

proviso to Art. 309 of the Constitution came into force from October 1, 1962. Under the Rules, the Central Secretariat Service was constituted and as per rule 3 there are four grades in the Service classified as follows :

- (i) Selection Grade (Deputy Secretary to the Government of India or equivalent);
- (ii) Grade I (Under Secretary to the Government of India or equivalent);
- (iii) Section Officers;
- (iv) Assistants.

The first two grades are classified as Central Civil Service, Grade 'A' while the other two are known as the Central Civil Service, Grade 'B' Ministerial. Posts in the first three grades are non-gazetted. The Rules contemplate that



there shall be separate cadres in respect of Section Officers' grade and the Assistants' grade and these shall be constituted for each Ministry or office specified in col. 2 of the First Schedule. Under rule 4, a single point gradation list in respect of officers of the Selection Grade and Grade 1 for all the Ministries or offices specified in col. 2 and for the offices specified against such Ministries or offices in col. 3 of the Schedule is to be maintained. The Rules contemplate direct recruitment as also promotion in respect of certain grades.

3. According to the petitioners the quota rule had broken down as direct recruitment had not been made in many years and on account of such failure, fixation of seniority with reference to the rotational method was not available to be followed. The petitioners also contended that select lists as contemplated by the Rules had not been framed for quite a long period and in the absence of such a select list framed in time, select lists of 1978, 1979 and 1980 prepared without following the criterion of length of service of officers in the grade of Assistants was not only unfair and arbitrary but worked out prejudicially to the petitioners. The main grievance of the petitioners in short is that the scheme for fixation of seniority and consequently the provisions relating to promotion having not been worked out as contemplated, the manner of determination of seniority should be usual rule of total length of service and action taken other-wise should be struck down and

seniority should be directed to be determined on the basis of length of service only.

4. Respondent No. 1, Union of India, has challenged these allegations by contending that the manner of fixation of seniority is covered by statutory rules and the petitioners are, therefore, not entitled to claim determination of seniority on the basis of length of service; the plea of the petitioners that there had been no direct recruitment for several years is denied and it has been pleaded that direct recruits have come into the service in all years except one, viz, 1966 and 1970, the quota rule has therefore, really not broken down as pleaded by the petitioners and the Rules having contemplated a scheme of direct recruitment and promotion, quota and rota have to work together. Therefore, fixing seniority with reference to the rotational method was not open to challenge. The Rules have been in force for well over two decades. Great care has been taken in making provision in the Rules to safeguard the interests of the different groups and greater care has also been taken by the Department of Personnel in the Ministry of Home Affairs to give effect to the Rules. Since the officers are drawn from different Ministries for promotion and working out the scheme involves a somewhat complicated process, as long as the policy under the Rules has been given effect to, the working should not be allowed to be attacked merely on account of a casual failure to work up to mathematical precision.



5. Before we start examining the correctness of the rival contentions advanced on either side, it is appropriate that a detailed reference to the Rules is made in order to ascertain the scheme.

6. 'Cadre' has been defined in Rule 2 (g) sub-rule (2) to mean the group of posts in the grade of Section officer and Assistant in any of the Ministries or offices specified in col. 2 of the First Schedule and any of the offices specified against such Ministry of office in Col. 3 of that Schedule. 'Cadre Officer' in Rule 2 (g) in relation to the Section Officers' grade of the Assistants' grade means a member of the service of the Section Officers' grade or Assistants grade, as the case may be, and includes a temporary officer approved for long term appointment to that grade. 'Long term appointment' means under Rule 2 (1) appointment for an indefinite period as different from a purely temporary or ad hoc appointment. 'Common Seniority List' has been defined in Rule 2 (hh) in relation to any grade to mean the seniority list of officers in that grade serving in all the cadres specified in the First Schedule as on the appointed day and revised from time to time in accordance with the regulations to be framed in that behalf by the Central Government. 'Probationer' has been defined in Cl. (o) of Rule 2 to mean a direct recruit appointed to a grade on probation in or against a substantive vacancy, and 'select list' under Rule 2 (q) is defined to mean the select list prepared in accordance with the regulations made under Rule 12 (4) or under the regulations contained

in the Fourth Schedule Rule 8 contemplates the initial constitution of each cadre and provides that the permanent and temporary officers the Section officers' grade and the Assistants' grade in each cadre on the appointed day shall be determined by the Central Government in the Department of Personnel & Administrative Reforms in the Ministry of Home Affairs.

7. Rule 12 makes provision for recruitment to selection grade 1. We are not concerned with this rule in the present case as the dispute is raised by Assistant and the promotional rank to which claim has been laid is that of Section Officer. For them Rule 13 is the relevant rule. Sub-rules (1) to (5) relate to Section Officers which remaining sub-rules (6) to (10) relate to Assistants. At the time when the Service was constituted sub-Rule (1) reads thus :

"Subject to the provisions of sub-rule. (3), for a period of five years from the appointed day, 1/4 of the substantive vacancies in the Section Officers' grade in any cadre and thereafter, 1/3 of the substantive vacancies in that grade, shall be filled by direct recruitment on the results of competitive examinations held by the Commission for this purpose from time to time....."

Sub-rule (1) of Rule 13 as it now stands reads thus :

"1/6 of the substantive vacancies in the Section Officers' grade in any cadre shall be filled up by direct re-



recruitment on the result of the competitive examinations held by the Commission for this purpose from time to time. The remaining vacancies shall be filled by the substantive appointment of persons included in the select list for the Section Officers grade in that cadre. Such appointments shall be made in the order of seniority in the select list except when for reasons to be recorded in writing, a person is not considered fit for such appointment in his turn." It is thus clear that the proportion of direct recruits has been reduced from the initial 1/4th or 1/3rd to the present 1/6th.

8. Sub-rule (2) of Rule 13 prescribes: Temporary vacancies in the Section Officers' grade in any cadre shall be filled by the appointment of persons included or approved for inclusion in the select list for the Section Officers' grade in that cadre. Any vacancies remaining thereafter shall be filled in equal proportion from among the (a) officers of Assistants' grade who have rendered not less than 8 years' approved service in the grade and are within the range of seniority on the basis of seniority subject to the rejection of the unfit.....and (b) officers of the Assistants' grade in that cadre with the longest period of continuous service in that grade on the basis of length of service subject to the rejection of the unfit." Sub-rule (5) prescribes the preparation of a select list of Assistants for promotion to the Section Officers' and the

manner of preparing and revising the select list has been set out in the Fourth Schedule.

9. Sub-rule (6) prescribes that 50% of the vacancies in the Assistants' grade in any cadre is to be filled by direct recruitment on the results of the competitive examinations to be conducted by the Commission from time to time and the remaining vacancies are to be filled by substantive appointment of persons included in the select list for the Assistants' grade in that cadre. Such appointments are to be made in the order of seniority in the select list except when for reasons to be recorded in writing, a person is not considered fit for appointment in his turn. When difficulties were added to sub-rule (6), one with effect from December 15, 1979. These were to the following effect.

"Provided further that substantive vacancies in any cadre reserved for direct recruitment on the appointed day against which no direct recruits have been appointed may be filled by substantive appointments made after the date of commencement of the Central Secretariat Service (Third Amendment) Rules, 1979 of persons included in the Select List for the Assistants' grade in that Cadre.

Provided also that if sufficient number of candidates are not available for filling up the vacancies in a cadre in any year by direct recruitment as aforesaid, the unfilled vacancies in the direct recruitment quota in that cadre shall



filled up by the substantive appointments of persons included in the Select List for the Assistants' grade in that cadre."

10. Sub-rule (6) (a) which was inserted along with the latter proviso provided: "Notwithstanding anything contained in sub-rule (6), the substantive vacancies reserved for direct recruitment as on 30th June 1979 on that cadre against which no direct recruits have been appointed till that date plus 50% of the number of such substantive vacancies in the cadre may be filled by substantive appointments made after the date of commencement of the Central Secretariat Service (Third Amendment) Rules, 1979, of persons included in the select list for the Assistants' grade in that cadre." Under Rule 15 every direct recruit to the grade of Assistant is initially to be appointed on probation for the period of two years from the date of appointment and every person other than a direct recruit when appointed would be on trial for a period of two years also. Rule 16 makes provision for confirmation of probationers subject to passing of prescribed tests and satisfactory completion of probation.

11. Rule 18 prescribes seniority in the different grades as on the appointment day. Sub-rule (1) indicates that relative seniority shall be as already determined on that day and if there had been no such determination the same was to be determined by the department of Personnel & Administrative Reforms,

Sub-rule (2) provides that all permanent officers included in the initial constitution of a grade shall rank senior to all persons substantively appointed to that grade after the appointed day and all temporary officers included in the initial constitution of a grade under Rule 8 shall rank senior to all temporary officers appointed to that grade after the appointed day. Rule 18, sub-rule (3) makes provision for the rule in the matter of fixation of inter se seniority for the Assistants' grade. Direct recruits are to rank inter se in the order of merit in which they are placed in the competitive examination on the result of which recruitment is effected. Recruits of an earlier examination are to rank senior to those of a latter examination. Persons appointed substantively to the grade from the select list for that grade shall rank inter se according to the order in which they are so appointed and the inter se seniority between direct recruits and persons substantively appointed to the grade for that grade shall be regulated in accordance with the provision made in the fourth Schedule.

12. Regulation 3 in the Fourth Schedule deals with seniority. Clause 3 of this regulation provides :

"Direct recruits to a Grade and persons substantively appointed to the Grade from the Select List for the Grade shall be assigned seniority inter se according to the quotas of substantive vacancies in the Grade reserved for direct recruitment and the appointment of persons included in the Select



List, respectively". From December 1977, contemporaneously with the insertion of the second proviso to Rule 13 (6) of the Rules, the following was added as a proviso to Cl. 3 of Regulation 3 :

"provided that persons appointed substantively in accordance with the provisions of sub-rule (6) of Rule 13 to the Grade from the Select List in any cadre in any year, against direct recruitment vacancies for which direct recruits are not available shall be placed enblock below the last direct recruit appointed in that year irrespective of the quotas reserved for direct recruits and persons included in the Select List."

13. In course of the hearing counsel for the petitioner referred to instances where a direct recruit coming into the cadre several years after others coming into the cadre from the Select List had been assigned seniority over such promotees. This was explained by counsel for the respondents to have been the outcome of giving effect to Cl. 3 of Regulation 3 as it stood prior to December, 1977 without the proviso. The instances relied upon were found to be events prior to the introduction of the proviso. In the absence of challenge to the Rules and the Regulation, resultant situations flowing from compliance of the same are not open to attack. Occasion for similar grievance would not arise in future as the proviso in the relevant regulation and Cls. (4) and (5) of the Regulation 3 will

now meet the situation.

14. Neither in the writ petition nor in arguments before us any challenge was advanced against the vires of the Rules. One of the known patterns constituting public service, particularly in the executive side, is to draw officers both by promotion as also by direct recruitment. The proportion is fixed depending upon the nature of the service the availability of suitable manpower and other relevant considerations. The petitioners have, therefore, rightly not challenged before us the scheme under which a moiety of the substantial vacancies in the Assistants' grade is to be filled by direct recruitment and the other by promotion through select list.

15. The Rules have held the field for 22 years now. During this period direct recruitment had not been made only in two years being 1966 and 1967. Though in the writ petition a general stand had been adopted that direct recruitment had not been made for several years, after the counter-affidavit was filed and it was emphatically asserted that excepting in these two years direct recruitment had been made in other years, there has been no change to that assertion. We agree with the contention that quota and rota have got to go hand in hand and if the quota is not properly adhered to, the rota system must fail. In fact, the scheme is such that it can operate in an appropriate way only when recruitment is effected through both the processes



**R. N. Misra**  
**Judge**  
**Supreme Court of India**

16. As we have already pointed out, difficulty was experienced in working out the process when the quota fixed by the Rules had not been adhered to for one reason or the other and vacancies were being carried forward for being filled up in future years. This situation necessitated insertion of the first proviso to sub-rule (9) of Rule 13 in August 1970 and the other proviso in 1977 as also sub-rule (6) (a) in 1979. The grievance voiced in these writ petitions obviously relates a period prior to the modification of the scheme.

17. The petitioners had, inter alia, prayed for the relief of striking down the select lists and for direction that the select lists be reframed on the basis of the length of continuous service in the grade of Assistants. In view of what we have said regarding the claim of seniority on the basis of length of continuous service, it is not at all necessary to examine the validity of that contention and give any direction regarding the select lists, particularly because the claim relating to reconsideration of select lists was grounded upon length of continuous service. Nothing was also shown in course of arguments as to why the select lists were bad. In fact, unless the Rules and regulations are successfully assailed, the select lists are not at all disputable.

18. The field which these Rules cover is indeed very wide one. Assistants in all the Ministries or offices specified in the First Schedule are covered

by the Rules. With a view to maintaining the efficiency of the service and at the same time to meet the requirements and exigencies of the service, separate cadres have been formed in respect of Assistants and Section Officers in the different Ministries and offices attached to such Ministries. Notwithstanding the fact that these cadres are different, the scheme makes provision for promotional avenue taking all of them into consideration. Obviously, working it out keeping in view the interests of so many employees in the different cadres is indeed a very onerous and difficult task. This has, therefore, been assigned to the Department of Personnel. Unless there is any serious failure in implementing the Rules and grave injustice is done to some individuals or a group of officers, we do not think it would be proper to interfere with the working of the scheme and dislocate the inter se seniority of the officers in these grades. No mala-fides has been pleaded nor has any grave injustice been established in the writ petitions. At the most a case of improper working of the scheme with reference to some of the officers has been alleged. Hairsplitting arguments, if accepted, might indicate that some of the petitioners have not been promoted to the grade of Section Officers as and when due. We are of the view that if there has been substantial compliance in implementing the scheme under the Rules, judicial interference is not called for. In a vast country



such as ours, a strong and independent bureaucratic set up is indispensable. At the same time it is equally necessary that the service from top to bottom must be alive to the fact that it is its obligation to maintain proper attitudes discipline and duty-oriented working. While it is the right of every person in the Service set-up to expect just and fair treatment in regard to his employment frequent litigation between him and the State involving countless other co-employees in the Service in the battle is a deviation from the right direction. It is true that very often instances come to light where the grievance is genuine and the treatment meted is unwarranted and uncalled for. Government in a democratic polity runs on impersonal basis but on the cardinal code that every one shall perform his duty. We may recall what this Court observed in *Dr. G. Marulasiddaiah v. Dr. T.G. Siddapparadhya*, (1971) 1 SCC 568:

"The canker of litigiousness has spread even to a sphere of life where discipline should check ambition concerning personal preferment. A teacher is justified in taking legal action when he feels that a stigma or punishment is undeserved but he is expected to bear with fortitude and reconcile himself to his lot suppressing disappointment when he finds a co-worker raised to a position which he himself aspired after."

19. There has been a phenomenal rise in service disputes in the last three decades. It is time that serious attention is devoted to discover the reason

for it and take effective steps to ensure curtailment thereof. Whether such litigations come before courts or tribunals is of no consequence here. Frequent litigations between the State and its employees ultimately affect the efficiency of the service and bring about indiscipline, lack of loyalty and an attitude of indifference.

20. In the course of arguments reference was made to certain decisions of this Court. In *N.K. Chauhan v. State of Gujarat*, (1977) 1 SCR 1037 (AIR 1977 SC 251), this Court held that the quota system does not necessitate the adoption of the rotational rule in practical application and many ways of working out quota prescribed can be devised of which rota is certainly one. It was further held that while laying down a quota when filling up vacancies in a cadre from than one source, it is open to Government, subject to tests under Art. 16, to choose 'a year' or other period of vacancy by vacancy basis, to work out the Quota among the sources. But once the Court is satisfied, examining the constitutionality of the method proposed, that there is no invalidity, administrative technology may have free play in choosing one or the other of the familiar processes of implementing the quota rule. This Court did indicate that as Judges we cannot strike down a particular scheme because it is unpalatable to forensic taste. This Court further pointed out that ordinarily seniority is measured by length of continuous officiating service. This, however, does



preclude a different prescription, constitutionality tests being satisfied when the Court found that promotees had been appointed in excess of their quota, the following direction was given : "Promotees who have been fitted to vacancies beyond their quota during the period B—the year being regarded as the unit must suffer survival as valid appointees acquiring new life when vacancies in their quota fall to be made up. To that extent they will step down, rather be pushed down as against direct recruits who were late but regularly appointed within their quota."

The rationale of this decision is indeed very much against the contentions of the petitioners.

21. Reference was also made to the case of *S.B. Patwardhan v. State of Maharashtra*, (1977) 3 SCR 775 : (AIR 1977 SC 2051). The dispute that fell for adjudication in that case one of seniority in the cadre of Deputy Engineers and grievance had been laid that notwithstanding the length of continuous service, later appointees had been drawn as senior. Attention in the decision was mainly confined to the terms of provisions of the Rules applicable to the State Engineering Service. In the view we have taken of the matter this decision indeed does not help the petitioners.

22. Next is the case of *Baleshwar Prasad v. State of U.P.*, (1981) 1 SCR 449 : (AIR 1981 SC 41). This Court pointed out that for the purposes of seniority appointment to the service in a substantive capacity was necessary. But that again

was said with reference to R. 23 of the U. P. Service of Engineers (Junior and Senior Scales Irrigation Branch) Rules.

23. This Court in *V. T. Khandoze v. Reserve Bank of India*, (1982) 3 SCR 411 : (AIR 1982 SC 917), took note of the fact that "no scheme governing service matter can be fool-proof and some section or the other of employees is bound to feel aggrieved on the score of its expectation being falsified or remaining to be fulfilled. Arbitrariness, irrationality, perversity, and mala fides will of course render any scheme unconstitutional but the fact that the scheme does not satisfy the expectations of every employee is not evidence of these."

24. Next is the case of *A. Janardhana v. Union of India*, (1983) 2 SCR 936 : (AIR 1983 SC 769). That was a case relating to dispute of inter se seniority of direct recruits and promotees in the Military Engineering Service. Seniority lists drawn up earlier on the basis of length of service including continuous officiation were subsequently altered to lists based on quota between direct recruits and promotees leading to rote for confirmation and this led to the dispute. The Court found that some of the officers had been promoted prior to the enforcement of the Rules in 1969. The Rules had no retrospective effect and, therefore seniority lists drawn up prior to the enforcement of the Rules were not open to be revised and re-drawn up after the Rules became operative. The Court further found that the quota rule had not been worked out and if rota-



tional confirmation was to be done, many of the employees considered hitherto senior would be very badly affected. Here again we must point out that this decision has no application to the facts before us since on the finding reached

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by us the quota rule was substantially complied with.

25. The writ petitions must accordingly fail. We make no order for costs.

Petitions dismissed.



**D. A. Desai**  
**Judge**  
**Supreme Court of India**

### OBSERVATION

**Constitution of India Art. 311 (2) — Order of compulsory retirement passed without following principles of natural justice — No rules fixing age of compulsory retirement — Art. 311 (2) is attracted — Enquiry is illegal and vitiated. Compulsory Retirement — Where there is no rule fixing the age of compulsory retirement or if there is one and the servant is retired before the age prescribed therein, then that can be regarded only as dismissal or removal — Enquiry in accordance with the rules of natural justice would be a prerequisite before imposing any penalty — Constitution of India, Art 311 (2).**

### OBSERVED BY

**Mr. D. A. Desai, Mr. V. Balakrishna Eradi and  
 Mr. V. Khalid  
 Hon'ble Judges, Supreme Court of India**

### IN

**Civil Appeal No. 1605 of 1971 decided on 10-4-1985, in the case of Murari Mohan Deb, Appellant v. Secretary to the Govt. of India and others, Respondents.**

### TEXT

Desai, J. :—Murari Mohan Deb, a forest officer in the employment of Tripura Government was compulsorily retired from service by the order dated October 1962 of the 4th respondent Chief Forest Officer. Since then he is knocking at the doors of the courts in search of illusory justice and chasing mirage. He reached the age of superannuation. As! the ways of justice like the ways of Providence are inscrutable. And who to blame, if not, the system.

2. The appellant questioned the correctness and validity of the order of compulsory retirement in Writ Petition No. 22 of 1964 which came to be disposed of after a lapse of six years on November 28, 1970. In his writ petition

the appellant had impleaded (1). The Secretary to the Government of India, Ministry of Home Affairs, (2) The Chief Commissioner, Tripura, (3) The Secretary to the Government of Tripura, Forest Department and (4) The Chief Forest Officer, Government of Tripura, last one being the one who had passed the impugned order of compulsory retirement. The grievance in the writ petition was that penalty of compulsory retirement was imposed upon the appellant without affording the appellant an adequate opportunity to defend himself and to explain the charges levelled against him. In short it was alleged that the enquiry was held in violation of the prin-



ciples of natural justice.

3. The respondents resisted the writ petition inter alia contending that as the punishment of compulsory retirement does not tantamount to dismissal or removal from service as contemplated by Art. 311 (1) and therefore, no formal enquiry was necessary to be held before imposing the penalty. It was contended that adequate opportunity was afforded to the appellant to controvert the charges and defend himself.

4. Surprisingly, when the matter was taken up for hearing, the learned Judicial Commissioner suo moto raised the objection that in the absence of Union of India being made a party, the petition was not properly constituted.

5. After an elaborate discussion, the learned Judicial Commissioner recorded a finding that Government of India was a necessary party and in its absence the petition is incompetent and must be rejected. After having reached this firm conclusion, the learned Judicial Commissioner proceeded to investigate the contention of the appellant that the enquiry against him was held in violation of the principles of natural justice, and that the Chief Forest Officer being not the appointing authority could not impose the penalty of compulsory retirement on the appellant. In respect of the second contention, the learned Judicial Commissioner held that as it has been unquestionably established that the appellant was appointed by the Chief Commissioner the Chief Forest Officer, a subordinate of the Chief Commissioner was

not competent to impose the Penalty of compulsory retirement and therefore, on merits the order was bad. However, consistent with his view that the writ petition in the absence of Union of India was incompetent, he rejected the writ petition. Hence this appeal by special leave.

6. This appeal reached hearing on July 26, 1984 and after hearing Mr. D.N. Mukherjee, learned counsel for the appellant and Mr. Abdul Khader, learned counsel for Tripura Administration, who told them that the appeal is being allowed and the impugned order is being set aside. However, at this stage, Mr. Abdul Khader, learned counsel for the State of Tripura pointed out that as the appellant even on his showing has reached the age of superannuation, even if the impugned order is illegal and invalid, the relief of reinstatement cannot be granted to him. As the facts were not clear, a direction was given that the matter be listed on August 7, 1984 for clarification about the date of superannuation of the appellant. At the resumed hearing it was conceded that had the appellant not been compulsorily retired from service, he would have retired on superannuation on December 6, 1978. In this fact situation the relief of physical reinstatement could not be granted. On that day a direction was given that the second respondent should compute and calculate the back wages payable to the appellant on the footing that the order of compulsory retirement is illegal and invalid and the appellant continued to be in



**D. A. Desai**  
**Judge**  
**Supreme Court of India**

ice till December 6, 1978. The  
 ter thereafter was listed on October  
 1984 when Mr. Abdul Khader,  
 ed counsel for the second respon-  
 produced before us the rough com-  
 putation made by the competent autho-  
 pursuant to out direction showing  
 approximately Rs. 93,000/- would  
 payable to the appellant as and by  
 of back-wages and he would be  
 tled to gratuity and pension there-  
 r. The plight of the appellant lent  
 ency to the matter inasmuch as the  
 ellant wss without succour for a  
 g period, a direction was given that  
 second respondent i. e. Tripura Ad-  
 ministration should pay Rs. 93,000/- by  
 mand draft drawn in favour of the  
 ellant within four weeks from the  
 e of the order. A further direction  
 given that year to year calculation  
 computation of back wages must be  
 mitted the Court.

7. Kamal Baran Dev son of the  
 ellant filed an affidavit dated Novem-  
 7, 1984 in which he pointed out  
 had the appellant continued in ser-  
 , if the illegal order of compulsory  
 rement had not been made, he would  
 e earned two promotions, namely, as  
 est Ranger and Senior Forest Ranger,  
 posts in Class III and IV grade. Acco-  
 ng to the appellant's computation, has  
 sion be fixed at Rs. 550/- p.m. Accor-  
 g to him, he would be entitled to re-  
 er Rs. 3,25,000/- from the respondents  
 the period upto and inclusive of July,  
 4.

8. Shri R. M. Dutta, Deputy Con-  
 servator of Forests, Government of Tri-  
 pura filed a counter-affidavit in which  
 it is pointed out that looking to the age  
 and qualifications of the appellant, he  
 would not have earned a single promo-  
 tion. It was pointed out that the post of  
 Forest Ranger and that of Senior Forest  
 Ranger are governed by the recruitment  
 rules which came into force in 1965 which  
 did not envisage automation promotion  
 purely according to seniority. It was also  
 pointed out that seniority is was also  
 pointed out that seniority is only one of  
 the criteria that the Departmental Promo-  
 tion Committee has to take into consi-  
 deration while recommending the promo-  
 tion of a Forester to the post of Forest  
 Ranger. It was further pointed out that  
 the revised pay scale for the post of a  
 Forester was Rs. 260-495/- effective from  
 March 1, 1974 and that the appellant  
 would have retired in that scale. To this  
 affidavit was annexed calculations mon-  
 thwise and it was pointed out that at best  
 the appellant would be entitled to Rs. 93,  
 444.80 p. inclusive of pension from  
 6-12-78 to September 30, 1984, encash-  
 ment of leave and gratuity.

9. Mr. D. N. Mukherjee, learned  
 counsel for the appellant urged that we  
 should not accept the computation as  
 made by the competent authority as  
 set out in the annexure to the affidavit  
 of Shri R. M. Dutta. To a query of the  
 court as to how the appellant has  
 worked out his arrears of back-wages  
 at Rs. 25,000/-, there was hardly any  
 convincing answer though some rough



and ready calculation was attempted to be offered to us which we find very difficult to implicitly rely upon.

10. Mr. Abdul Khader fairly stated that it is difficult to support the judgement of the learned Judicial Commissioner that in the absence of Union of India being impleaded as a party, the petition as constituted was incompetent. We have not been able to appreciate why the learned Judicial Commissioner should have taken upon himself to raise this untenable contention even though the respondents did not raise such a contention. Respondent No. 1 is shown to be the Secretary to the Government of India, Ministry of Home Affairs. If there was technical error in the draftsmanship of the petition by a lawyer, a Forester a class IV low grade servant should not have been made to suffer. An oral request to correct the description of the First respondent would have satisfied the procedural requirement. By raising and accepting such a contention, after a lapse of six years, the law is brought into ridicule. The court could have conveniently read the cause title as Government of India which means Union of India through the Secretary, Ministry of Home Affairs instead of the description set out in the writ petition and this very petition would be competent by any standard. The contention is all the more objectionable for the additional reason that the appointing authority of the appellant, the Chief Commissioner of the Government of Tripura as well the

Chief Forest Officer who passed the impugned order were impleaded and they represented the administration of Tripura Government as well as the concerned officers. Therefore, not only the petition as drawn up was competent but no basis of contention could be taken about its incompetence. Mr. Abdul Khader learned counsel for the Government of Tripura rightly did not press this point.

11. The learned Judicial Commissioner rightly held that the impugned order of compulsory retirement was imposed by an authority not competent to impose the same and therefore it is ab initio illegal and invalid. Further, it appears crystal clear from the record that in this case when the appellant was only 42 years of age, compulsory retirement was imposed as a penalty for misconduct. We are not unaware of the legal position that where relevant service provides for an age of superannuation and permits compulsory retirement in public interest on reaching a certain age lower than the age of superannuation, an order of compulsory retirement according to relevant service rules cannot be styled as imposing a penalty and obviously Art. 31(2) will not be attracted. As held by this Court in *Shyam Lal v. State of U. P.* (1955) 1 SCR 26 : an order of compulsory retirement differs both from an order of dismissal and an order of removal from service in that it is not a form of punishment prescribed by the rules, and involves no penal conse-



ences, inasmuch as the person who retires is entitled to pension proportionate to the period of service standing to his credit. 'See *State of Bombay v. Saubhagchand M. Doshi* 1958 SCR 571. It thus appears that where the relevant service rules fixed both an age of superannuation and an age of compulsory retirement and the services of a Government servant governed by the rules are terminated between these two points of time, the order of compulsory retirement could not be said to cast a stigma and would not attract Art. 311. But where there is no rule fixing the age of compulsory retirement or if there is one and the servant is retired before the age prescribed therein, then that can be regarded only as dismissal or removal within Art. 311 (2).' See *Saubhagchand Doshi's case* at 579 (of SCR). In this case it is admitted that the relevant service rules prescribed an age of superannuation. It was not pointed out that the relevant rules fixed some other age beyond which and before reaching the age of superannuation, a Government servant can be compulsorily retired in public interest. Nor it is claimed that the order of compulsory retirement in this case was made under the relevant service rules in public interest. It would have been atrocious to contend to that effect in respect of a Forester, a low grade class IV servant who would be required to be compulsorily retired in public interest. But if there was such a rule we would have positively examined the same. At any rate, it is crystal clear that the appellant was aged only

42 when the order of compulsory retirement was made. It was not sought to be supported on the ground that the appellant having put in service for a certain number of years, he could have been compulsorily retired. On the contrary it is admitted that the order of compulsory retirement was by way of penalty imposed upon him for misconduct after an enquiry. Obviously therefore, Art. 311 (2) will be attracted and an enquiry in accordance with the rules of natural justice would be a pre-requisite before imposing any penalty. It would be presently pointed out that the enquiry was sham and held in violation of principles of natural justice.

12. The enquiry officer issued a notice that the enquiry against the appellant would be held at Rangamura but at short notice subsequently, the venue was suddenly shifted to Radhnagar where the appellant could not keep his witnesses present. He did not have an opportunity of examining the records used against him. Therefore, for more than one reason, the enquiry appears to have been held in violation of principles of natural justice and is vitiated. If the enquiry was illegal, any punishment imposed as a result of the enquiry must fail. Therefore, the order of compulsory retirement is bad for more than one reason and liable to be set aside and is hereby set aside.

13. Once the order of compulsory retirement is set aside, the appellant continues to be in service. He has reached the age of superannuation as on December 6, 1978 as pointed out in the



affidavit and not controverted. Therefore, it is not permissible to direct his reinstatement in service. He would be entitled to back-wages from the date of compulsory retirement on October 16, 1962 till the date of his superannuation on December 6, 1978.

14. Before we determine the amount payable as back-wages, we must make it distinctly clear that while computing the amount we have kept in view the meagre monthly salary which the appellant would have received for the years 1974 when the pay scale of his post was revised. In any year if he had received full salary, he was not liable to pay income-tax at the rates then in force. Even the revised salary with the exemption limit of income-tax going up would have not been assessable to income-tax. And this lowest grade Class IV servant, we were informed had no other source of income, Now that the amount is payable in the lump sum, presumably the Government may resort to Sec. 192 of the Income-tax Act. But let it be made distinctly clear that the appellant is entitled to the benefit of Sec. 89 and Rule 21A of the Income-tax Rules and he is entitled to relief under Sec. 89. Therefore, while computing the total amount, we have kept the spread-over in view and in no year any income-tax is deductible from the meagre salary of this low

paid IV employee. If therefore, any deduction is made towards income-tax while making the payment, it is incumbent upon the Tripura administration to take all necessary steps to obtain the relief for the appellant under Sec. 89 of the Income-tax Act read with Rule 21A of the Income Tax Rules.

15. As pointed out earlier, rival contentions and calculations have been examined by us and keeping them in view and having regard to the circumstances of the case, we direct that over and above the amount of Rs. 93,000/- already paid to the appellant, he should be paid Rs. 7,000/- more towards back wages and pension upto and inclusive of December 31, 1984. The respondent shall pay pension at the rate of Rs. 400/- from January 1, 1984. The appellant shall also be paid dearness allowance if admissible to pensioners getting pension at Rs. 400/- p.m. The appellant shall also be paid gratuity at the admissible rate treating him in service upto and inclusive of December 6, 1978. The payment herein directed shall be made within a period of eight weeks from today. The respondent shall also pay costs to the appellant quantified at Rs. 2,000/-. Appeal is allowed to the extent herein indicate.

Appeal allowed.



**R. N. Misra**  
**Judge**  
**Supreme Court of India**

### OBSERVATION

- (A) Constitution of India, Arts. 16, 14, 226—Appointment—Regularization—Trainee Engineers of State Electricity Board continued as such since long Board treating them as specific class—Equitable doctrine—Applicability of—Board was bound to regularise appointments—Mandamus issued accordingly. 1984 1 Serv. LR 283 (Pat), Reversed. (i) Master and servant—Appointment, Regularisation of; (ii) Master and servant—Equitable doctrine, applicability of)
- (B) Constitution of India, Art. 12—"State"—Bihar State Electricity Board a statutory authority—Hence, it is a "State" within Art 12. (State—Meaning

### OBSERVED BY

Mr. S. Murtaza Fazal Ali, Mr. A. Varadarajan and  
 Mr. Ranganath Misra,  
 Hon'ble Judges, Supreme Court of India

### IN

Civil Appeals Nos. 268 and 269-273 of 1984, decided on 8-5-1985, in the case of Ramesh Narain Yadav and others, Appellants v. Bihar State Electricity Board and others, Respondents.

### TEXT

Ranganath Misra, J. :—These appeals are by special leave and two of these are by Junior Engineers while the other four are by Assistant Engineers working under the respondent Bihar State Electricity Board. In Sept. 1975, the Board advertised in local newspapers that selection of Electrical Engineers would be made under an "Employment Promotion Programme" and engineers with 50 percent marks in the degree examination would be eligible for consideration. In due course, such selection was made and a group of Apprentice Engineers also called Trainee Engineers came to serve under the Board.

These selected engineers had already completed their training for the purpose of obtaining the degree in engineering. The graduate trainees were called upon to report for a period of six months' training with effect from April 1, 1977. In March 1977, the Board had indicated that the training does not guarantee employment under the Board but in Aug. 1977, the Board resolved that 200 vacant posts of Junior Engineers would be filled on the basis of chain system and the existing trainees would be continued as trainees on existing stipends. As time elapsed and no appointments were made as represented by the Board,



representation was made by some of the trainee engineers pointing out that unless the Board's decision of Sept. 1977, was implemented without loss of time some of them would become overaged for appointment under Government. Soon after the said representation, the Board extended deputation of the trainee engineers and indicated that the deputation to Thermal Power Stations under the Board would be of permanent nature. The Board published a notice on March 13, 1979, to the effect that a decision regarding regular employment of degree and diploma trainee engineers of the Board for the post of Assistant Electrical Engineers and Junior Electrical Engineers has been taken by the State Government and on completion of their training in Oct. 1979, regular appointment would be made. It was further pointed out there in that those trainees who had left training should join at the places of their respective posting latest by March 88, 1979, failing which they would not be considered for regular appointments. As the Board did not give effect to its representations and decisions, the graduate engineers employed as Assistant Engineers or Junior Engineers started agitating for implementation of the Board's decisions from time to time. Ultimately, on March 8, 1979, at a high level meeting where the Speaker of the Legislative Assembly presided, the Chief Minister was present and among others participating in the meeting were the Commissioner of Irrigation and Electricity, the Chairman of

the Board and the Secretary of Irrigation and Electricity, it was decided :

"After completion of one year's training (which is October 1979) as decided by the Board they will be appointed in the post of Assistant Electrical Engineer and Junior Electrical Engineer on 'provisional regular basis'. After appointment they will remain on probation for two years. During the probation period if their conduct is found satisfactory and the availability of permanent posts and on the basis of inter se seniority in the cadre they shall be confirmed."

"They will be appointed on regular basis after the completion of training period and examination as proposed vide office order No. 1548 dated 26-10-78 will not be taken."

The Board communicated the aforesaid decision to the Project Managers and Thermal Power Stations of the Board, yet the decision was not implemented and the apprentice engineers continued to serve as Assistant Engineers and Junior Engineers on ex cadre basis, without security and stability of service. Some unemployed Engineers approached the High Court at Patna challenging the continuity of the trainee Engineers in the employment of the Board. The Board took the stand before the High Court that the trainees engineers belonged to a separate class and held ex cadre appointment Assistant Engineers and Junior Engineers. The High Court took the view that their continuity on ex cadre



was not open to challenge on the ground of non-compliance of Rules. In 1980, these writ petitions were dismissed. Emboldened by the acceptance of their stand by the High Court, the Board started exhibiting a negative approach in its treatment towards the three engineers. Ultimately the appellants moved the High Court for a direction to the Board to encadre them but failed. These appeals are directed against the decision of the High Court.

2. A few important aspects emerge from the record (1) the Board did represent to the trainee engineers from time to time that after their training was completed, they would be absorbed in regular employment of the Board; (2) when some of the engineers were getting age-barred for Government employment and had approached the Board, they were told to come back under the temptation of getting permanently employed under the Board; (3) when the Board was reeling under a shortage of its employees, these trainee engineers had stood by the Board to pick up the generation and distribution of electricity and had been assured of absorption; and (4) the Board had decided to absorb them on permanent basis but initially on a probation of two years without conducting any further examination.

3. On March 13, 1979, a notice was issued by the Board to the following effect.

"A decision regarding regular employment of degree and diploma

trainees of Bihar State Electricity Board in the posts of Assistant Electrical Engineer and Junior Electrical Engineer has been taken by the State Government. On completion of their training in October, 1979, their regular appointments will be made. Therefore, those trainees who have left their training are informed to join at the places of their respective postings latest by 18-3-1979. Those trainees who will not present themselves by the said date will be neither considered for being taken in training nor their regular appointments will be considered."

On April 26, 1979, the Board approved the proposal contained in the proceedings of a meeting relating to absorption of the appellant engineers in which the Speaker of the Legislative Assembly presided and the Chief Minister, the Commissioner of Irrigation and Electricity, the Chairman of the Board and the Secretary of Irrigation and Electricity participated. The proceedings, inter alia, stated :

"(1). It was decided that after completion of one year's training (which is October, 1979) as decided by the Board, they will be appointed in the posts of Assistant Electrical Engineers and Junior Electrical Engineers on provisional basis. After appointment, they will remain on probation for two years. During probation period if their conduct is found satisfactory and on the availability of permanent posts and on the basis of inter se seniority in the cadre, their appointments will be con-



firmed.

(2) They will be appointed on regular basis after the completion of the training period and the examination proposed vide office order. No 1548 dated 26-10-1978 will not be taken.

x x x x x

(9) It is also decided that the benefit of regular appointment is being given to the trainees under special circumstances which will not be an example for the future and when either under the Apprenticeship Act or under any other scheme anyone is taken as apprentice, he will be discontinued after the period of apprenticeship. In any circumstance, neither period of apprenticeship will be extended nor will they have any claim for appointment under the Board."

4. We have referred to these two documents out of several of them available on the record to show that the Board was aware of the position that these trainee engineers formed a special class and very peculiar circumstances warranted a definitely special treatment in regard to them, yet it is unfortunate that a statutory body like the Board has failed to stand up to its representations made from time to time to a group of engineers who had spent years of their valuable life for qualifying themselves as engineers and who believing the representation of the Board and acting upon the same continued to remain in the employment of the Board as trainee engineers foregoing opportunities available to seek other employments and in

the process have become age-barred for any public employment. This Court almost a score of years back in clear language indicated in *Union of India v. Indo-Afghan Agencies* (1968) 2 SCR 366:

"Under our jurisprudence, the Government is not exempt from liability to carry out the representation made by it as to its future conduct and cannot on some undefined and undisclosed ground of necessity or expediency fail to carry out the promise solemnly made by it, nor claim to be the judge of its own obligation to the citizen or an *ex parte* appraisal of the circumstances in which the obligation has arisen."

Shah, J. as the learned Judge then was; quoted with approval what Chandersekhar Aiyar, J. had said in *Collector of Bombay v. Municipal Corporation* (1952) 3 SCR 43:

"Whether it is the equity recognised in *Ransden's case* (1866) LR 1 H 129) or it is some other form of equity is not of much importance. Courts must do justice by the promotion of honesty and good faith, as far as it lies in their power." The legal position was reiterated by this Court in *Century Spinning & Manufacturing Co. Ltd. v. Ulhasnagar Municipal Council* (1970) 3 SCR 854 where it was said (Paras 11 & 12):

"Public bodies are as much bound as private individuals to carry out representations of facts and promises made by them, relying on which other persons have altered their position to their prejudice. The obligation arising against



**R. N. Misra**  
**Judge**  
**Supreme Court of India**

an individual out of his representation mounting to a promise may be enforced ex contract by a person who acts upon the promise; when the law requires that a contract enforceable at law against a public body shall be in certain form or be executed in the manner prescribed by statute, the obligation may be, if the contract be not in that form, enforced against it in appropriate cases in equity.....”

This Court added a pithy observation:

“If our nascent democracy is to thrive different standards of conduct for the people and the public bodies cannot be permitted. A public body is, in our judgement, not exempt from liability to carry out its obligations arising out of representations made by it relying upon which a citizen has altered his position to his prejudice.”

In *Motilal Padampat Sugar Mills Co. Ltd. v. State of Uttar Pradesh* (1979) 2 SCC 409, this Court went ahead to state that the doctrine of promissory estoppel, but it is a doctrine evolved by equity in order to prevent injustice and it can be basis of a cause of action.

5. In our view, the principle relied upon in these cases has full application to the facts before us. The Board is a statutory authority and is ‘State’ within the meaning of Art. 12 of the Constitution. The Board has tried to seek shelter under a set of rules framed by it in exercise of the powers vested under S. 79 of the Electricity (Supply) Act of 1948. In the peculiar facts of the case

we are of the view that the defence is illplaced and cannot hold as a shield against the application of the equitable doctrine. Admittedly, the trainee engineers before us formed a specific class and from time to time the Board treated them as members of a class and in its resolution of April 26, 1979, recognised this fact and swore to the position that such even if apprentice engineers were appointed.

6. Learned counsel appearing for the Board indicated to us that the Board was prepared to regularise the employment of the appellants belonging to the of the Assistant Engineers or Junior category Engineers subject to their qualifying in the examinations and being formally recruited as required under the rules. They further emphasised that the appellants would not be entitled to seniority above those who have already been regularly employed under the Board.

7. To far as the first aspect is concerned, we have sufficiently pointed out already that the Board had waived the requirement of examination and had, while taking advantage of the services of the appellants when it was in need, delayed the implementation of its representations. But it appears that several engineers have also been recruited either on permanent or temporary basis against regular vacancies and they are not parties to these appeals. The appellant therefore, cannot have seniority above those people and we would not be justified in making any direction which would prejudice their seniority behind their back. It appears that there



have been recruitments even during the pendency of these appeals. While granting leave and while disposing of miscellaneous petitions for directions, this Court has already made it clear that appointments pendente lite would be subject to the result of the appeals. Therefore, the recruits of 1983 are bound to be subject to our direction. We are inclined to take the view that the appellants being already in employment of the Board much prior to 1983 on being taken into regular appointment of the Board have to rank above the recruits of 1983 and in the years thereafter.

8. The Board in our view is, therefore, bound to regularise the appointments of the appellants who had been taken as tainee engineers initially and have continued to be in the employment of the Board. In this view of the matter the after hearing was over we issued mandamus to the Board to offer regular appointment to the appellants within three months from that day, i. e. May 3, 1985, in the appropriate cadre of Assistant Engineer or Junior Engineer,

as the case may be, and such appointments were to be on probation for a period of two years as required under the rules. In regard to seniority the appellants have to rank below permanent and temporary recruits to the regular posts of engineers held under the Board prior to 1983 and they shall be assigned seniority above such recruits pendente lite. We have now indicated the reasons by our judgement. The appeals are allowed and the judgement of the High Court is reversed and the Board is directed to give effect to the directions indicated above within the specified time.

9. We hope and trust that the Board will not conduct itself in such an embarrassing way in future and land itself in difficulty again.

10. The appellants shall have their costs throughout. One set of hearing fee assessed at Rs. 5,000/- shall be admissible in this Court.

Appeals allowed



**R. N. Misra**  
**Judge**  
**Supreme Court of India**

### **OBSERVATION**

**Payment of Gratuity Act (39 of 1972), Sections 4, 5, 13 and 14—Gratuity payable to workman employed under Calcutta Dock Labour Board—Not liable to attachment for satisfaction of decree.**

### **OBSERVED BY**

**Mr. P.N. Bhagwati and**  
**Mr. Ranganath Misra,**  
**Hon'ble Judges, Supreme Court of India.**

### **IN**

**Civil Appeal No. 345 of 1945, decided on 11-2-1985, in the case of Calcutta Dock Labour Board and another, Appellants v. Smt. Sandhya Mitra and others, Respondents.**

### **TEXT**

**Ranganath Misra, J.:—Special leave granted.**

The short question which falls for decision in this appeal is whether gratuity payable to a workman employed under the Calcutta Dock Labour Board (hereinafter referred to as 'Board') is attachable for satisfaction of a decree of the Court. Mr. Safiur Rehman was a dock worker and gratuity was payable to him under one of the three prevailing schemes of the Board. Respondent I filed a suit before the Court of Small Causes at Calcutta asking for recovery of a sum of money against the widow and son of the said Md. Safiur Rehman after his death and prayed for attachment of the gratuity payable to the said workman. The Court made an order and called upon the Board to withhold payment of the amount whereupon

the Board pointed out to the Court that gratuity was not liable to attachment. On receipt of such intimation, the Court made an order requiring the Board to show cause as to why it may not be proceeded against for disobedience of the Court's direction. The Chief Judge of the Court of Small Causes examined the objection against attachment and overruled the same. Against the rejection of objection appellants moved the High Court at Calcutta and contended that the gratuity payable to the workman was not liable to attachment. A Division Bench of the High Court examined the tenability of the contention and came to the following conclusion.

"On a careful consideration of the legal position we, however, find that the learned Chief Judge is right in his conclusion. Plaintiff has a legal right to attach any debt payable to his debtor



legal representative. This right, however, is always subject to exceptions made by any statutory provision. Section 13 of the Payment of Gratuity Act no doubt bars attachment but that only is in respect of gratuity payable under that Act. The gratuity now under attachment is payable not under the Act. Section 60 of the Code of Civil Procedure as amended may bar attachment of gratuity as now under consideration. But that section as it now stands had not been made applicable to Presidency Small Cause Courts. Under Section 8 of the Code, the High Court adopted certain provisions of the Code including Section 60 as amended up to 1965 and made them applicable to Presidency Small Cause Courts, Section 6 Clause (g) so adopted reads as follows :

‘(g) Stipends and gratuities allowed to pensioners of the Government or payable out of any service, family pension fund notified in Official Gazette by the Central Government or the State Government in this behalf and political pensioners’. This clause does not cover the gratuity payable by the Board to a registered dock worker and the subsequent amendment of this clause not having been adopted and made applicable by the High Court to Presidency Small Cause Court, the learned Chief Judge is right in his conclusion.

Next reliance is placed on Rule 9 of the Gratuity Rules which no doubt purports to exempt gratuity from attachment. But these rules not having been made by the Central Government on powers dele-

gated by the Parliament under the Dock Workers (Regulation of Employment) Act, but by the Board on sub-delegation of powers under the scheme, the same in our view cannot override the legal right of the plaintiff”.

2. Mr. Mukherjee appearing for the appellants maintained that the view taken both by the Chief Judge of the Small Cause Court as also the Division Bench of the High Court is contrary to law and therefore, cannot be sustained. The respondents had filed an appearance through counsel but no one participated in the hearing.

3. Section 1 (3) of the Payment of Gratuity Act (39 of 1972) (‘Act’ for short), provides that the Act shall extend to ports. ‘Port’ has been defined in Section 2 (n) of the Act. There can be no dispute that the Calcutta Port is covered by the Indian Ports Act, 1908. It is true that under one of the three schemes framed by the Calcutta Dock Labour Board gratuity was payable to Md. Saifur Rehman, but such gratuity must be taken to be covered by Section 4 of the Act, in the absence of any notification contemplated under Section 5. The authority vests the appropriate Government by notification and subject to such conditions as may be specified in that notification to exempt inter alia, any port to which the Act applies, from the operation of the provisions of the Act, if in the opinion of the appropriate Government the employees in the port are in receipt of gratuity or pensionary benefit not less favourable than the benefits conferred



under the Act. Neither the Chief Judge nor the High Court has found that there has been a notification as contemplated under Section 5 of the Act in this case. It had also not been contended at any stage by the respondents that such a notification had been made.

4. Reference may now be made to Sections 13 and 14 of the Act which are very relevant.

“13. Protection of gratuity No gratuity payable under this Act shall be liable to attachment in execution of any decree or order of any civil, revenue or criminal court”.

14. Act to override other enactments, etc :—

The provisions of this Act or any rule made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument or contract having effect by virtue of any enactment other than this Act.”

5. We may point out that by Central Act No. 25 of 1984 Section 13 has been amended with effect from July 1, 1984, and the amended section reads thus :—

“No gratuity payable under this Act and no gratuity payable to an employee employed in any establishment, factory, mine, oilfield, plantation, port, railway company or shop exempted under Sec. 2 shall be liable to attachment in execution of any decree or order of any civil, revenue, or criminal Court”. In the absence of any notification within the meaning of Section 5 of the Act the

amendment is not relevant for consideration. Section 14 has overriding effect and Section 13 gives total immunity to gratuity from attachment. The Preamble of the Act clearly indicates the legislative intention that the Act sought to provide a scheme for payment of gratuity to all employees engaged in, inter alia, ports and under this Act gratuity was payable to workers like Md. Safiur. Rehman. The gratuity which was payable to him squarely came within the purview of the Act and, therefore, became entitled to immunity under Sec. 13 thereof.

6. In Section 60 of the Code of Civil Procedure provision for exemption from attachment has been made and a detailed list has been provided in subsection (1) thereof in clauses (a) to (q). Clause (g) thereof exempts stipends and gratuities allowed to pensioners of the Government or of a local authority or of any other employer from attachment. It may be pointed out that the words “local authority” or “other employer” were inserted into the statute by the amending Act of 1976 with effect from February 1, 1977. The Chief Judge as also the High Court relying on the provisions of Section 8 of Code took the view that unless extended by the High Court of Calcutta, the protection of Section 60 was not available in regard to proceedings before the Presidency small Cause Court at Calcutta. It appears that the Calcutta High Court in exercise of power under Section 8 of the Code had extended the provision of the Section 60 of the Code but the High Court seems



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**R. N. Misra**

**Judge**

**Supreme Court of India**

to have wrongly taken the view that the effect of Section 97 of the Amending Act of 1976 was that the notification of the High Court was no more effective unless re-made. It is wholly unnecessary for the disposal of this appeal to examine that aspect as in our view the immunity under Section 13 of the Act is adequate to accept the appeal and find against the

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respondent. We, therefore, allow the appeal and hold that the Chief Judge also the High Court were in error in taking the view that gratuity payable to M. Safiur Rehman was liable to attachment. Parties are directed to bear their own costs.

**Appeal allowed**



**O. Chinnappa Reddy**  
**Judge**  
**Supreme Court of India**

### OBSERVATION

(A) Evidence Act (1 of 1872), S. 3—Appreciation of evidence—Criminal cases—Witnesses, Govt. Servants or police officers assisting investigation agencies—Their evidence cannot be rejected merely on that count. Decision of Gujarat High Court, Reversed—(i) (Penal Code) (45 of 1960), S. 161—(ii) Prevention of Corruption Act (2 of 1947), Ss 5 (1) (d), 5(2)—(Criminal trial—Appreciation of evidence Rejection of evidence of a witness by giving him a label, not permissible).

(B) Evidence Act (1 of 1872), Ss. 115, 114—Non—production of material witness—Bribery case—Failure of prosecution to examine an inspector who assisted Dy. S.P. to fetch Panch witnesses—Witness, not a material witness—Prosecution offering witness for cross-examination Counsel of accused not taking advantage of the same Held, it was not open to accused to comment upon the so-called failure of prosecution to examine the Inspector, nor the court could draw adverse inference against prosecution.

(C) Prevention of Corruption Act (2 of 1947), Sec. 5(2) and 5(1) (d) — Conviction under S. 5(1) (d) r/w S. 5 (2) as also under S. 161, Penal Code—Sentence—Accused, an Income-tax Officer—Long time elapsed since commission of offence—Accused, also retired from service—Accused taking large amount as bribe—Loss to public revenue—Held there was no special circumstances justifying Court taking lenient view.

### OBSERVED BY

Mr. O. Chinnappa Reddy and  
 Mr. E.C. Venkataramiah  
 Hon'ble Judges, Supreme Court of India

### IN

Criminal Appeal No. 180 of 1976, decided on 16-4-1985 in the case of State of Gujarat, Appellant v. Raghunath Vamanrao Baxi, Respondent.

### TEXT

O. Chinnappa Reddy, J. :— The Respondent was an Income-tax Officer. He was tried and convicted by the Additional Special Judge, Ahmedabad of offences under S. 161, Penal Code and S. 5(2) read with S. 5 (1)(d) of the pre-

vention of Corruption Act. He was sentenced to undergo rigorous imprisonment for one year and to pay a fine of Rs. 2,000/-on each of the two counts. On appeal, the High Court of Gujarat acquitted the accused of both the offen-



ces. The State of Gujarat has preferred this appeal by special leave of this court under Art. 136 of the Constitution.

2. The case of the prosecution briefly was as follows :

One Shashi Kant Mansukh Lal Sheth (P.W.2) was the Managing partner of a firm known as M/s. Hind Fertilizers, Bhavnagar. The assessments for the years 1968-69, 1969-70, 1970-71 and 1971-72 were pending before the accused Income-tax Officer. Between June and October 1971, there were nine hearings of the case. On 7-3-72, Laxmikant Sheth (P.W.7) the Income-tax practitioner who was representing the firm, received notice directing the firm's representative to attend his office on 14-3-72 with the firm's books of account and to show cause why sums totalling Rs. 1,94,378 should not be added to their returns of income for the years in question. The firm felt that the notice was not justified. As P.W.7 would be busy on 14-3-72, it was decided that they would go to the income-tax office with their books of account on 13th itself. On 10-3-72, Shashi Kant Sheth (P.W.2) contacted the income-tax officer on the telephone and the latter asked him to meet him at his residence at 2.00 P.M. Shashi Kant went to the house of accused at Bhavnagar that afternoon. He was told to come again on the evening of 13th. On the 13th, P. Ws. 2 and 7 went to the office and submitted the reply to the show cause notice. The accused wanted them to meet him again on 14th P.W.7 said he was busy on 14th, The accused then asked P.W. 2 to come alone. As previo-

usly agreed on 10th, Shashi Kant went to the house of the accused on the night of 13th when the accused told him that the clarification given by the firm was not satisfactory and that they would have to pay a sum of about Rs. 125000/- by way of tax unless a sum of Rs. 40,000 was given to him as a bribe. On P.W.2 pleading his inability to pay such a large sum, it was settled that a sum of Rs. 12,500 should be paid. P.W.2 wanted to consult his partner. He was told by the accused that he should bring the amount to his house on the evening of 14th March, 1973. Thereafter, Shashi Kant contacted Shri Judeja, Deputy Superintendent of Police, CBI who was camping at Bhavnagar. Shashi Kant complained to him about the demand of bribe of Rs. 12,500 by the accused. Shri Judeja then took the necessary steps for laying a trap. Two officers of the postal department Shri Parikh, Manager, Postal Store Depot Ahmedabad (P.W.3) who was staying in the quest-house, and Shri Panchal, an officer of the Postal Department stationed at Bhavnagar itself were requested to serve as panch witness. Shashi Kant was asked to bring currency notes of the value of Rs. 125,00. The notes were treated with phenolphthalein powder. Shashi Kant put the notes in his pocket. He was instructed to go to the house of the accused accompanied by Parikh and to tender the amount to the accused. On the accused receiving the amount. Shri Parikh was to come out of the house and signal the police party to come. A panchnama stating all these facts was duly prepared at the quest house. There



**O. Chinnappa Reddy**  
**Judge**  
**Supreme Court of India**

ter, as arranged, the raiding party proceeded towards the house of the accused. Shashi Kant and Parikh, P.W. and 3, went inside, Shashi Kant introduced Parikh to him as a member of his staff. They chatted generally for some time. The accused then mentioned about the amount to be paid to him whereupon Shashi Kant handed over the bundle of currency notes to him. The currency notes were received by the accused who carefully put them in a newspaper, and folded the newspaper. Parikh then went out and signalled to the police party Judeja, Dy. Supdt. of Police W. 9, the other Panch-witness Panchal and the rest of the police party rushed inside. The notes were seized. The accused was asked to dip his fingers in a solution of bicarbonate. The solution turned pink. Thereafter, the panchnama was prepared. After the investigation was duly completed, the respondent was charge-sheeted for the two offences of which he was ultimately convicted.

3. The defence of the accused was that the prosecution case was false. Shashi Kant came to his house with a stranger on the night of 14-3-72. He was surprised at his visit, but for the sake of courtesy, he asked him to sit down and asked him the purpose of his visit. Instead of replying him, Shashi Kant and the stranger stated talking about politics to him. He told him that he was a public servant and he was not interested in politics. He also told him that he wanted to go to feed. He went to the toilet for a few minutes and when he re-

turned, Shashi Kant and the stranger stood up and went away after shaking hands with him. A few moments later they returned with the police party. They must have planted the notes in the newspaper which was lying on the table when he had gone to the toilet.

4. It is seen from the facts narrated above that the meeting of Shashi Kant and Parikh with the accused on the night of 14-3-72 at 8.00 P.M. is not disputed. It is also not disputed that Shashi Kant and Parikh talked to the accused for quite a considerable time, nearly 40 minutes. It is further not disputed that within a few moments after Shashi Kant and Parikh left the accused, Judeja, Panchal and rest of the police party entered the house of the accused and currency notes of the value of Rs. 12,500/- were seized from the folds of a newspaper lying on the table. The accused was present all the time and there was no protest by him. That the fingers of the accused were also dipped in some solution is not disputed. The only question is whether the amount of Rs. 12,500 was received by the accused as a bribe or whether the amount was planted by Shashi Kant and Parikh during the brief visit of the accused to the toilet. The learned Sessions Judge accepted the evidence of Shashi Kant, Parikh and Judeja and convicted the accused as aforesaid. The High Court, however, took a remarkably curious view of the evidence and acquitted the accused. The High Court narrated several circumstances one after another, why the



prosecution cause should not be accepted. We have considered every one of the circumstances and we find that there is not a single satisfactory circumstance reasonably justifying the acquittal. On the other hand we find that everyone of the circumstances is overstated and fanciful.

5. The most important circumstance which seems to have weighed heavily with the High Court, almost to the point of obsession, was that Parikh and Panchal were not independent witnesses as they were both government servants and as they had some previous acquaintance with Inspector Sharma who was assisting Judeja in the investigation. The High Court was of the view that some other respectable residents of Bhavnagar should have been called as Panch-witnesses to be associated with the raid. We are afraid the High Court has entirely misdirected itself in appreciating the evidence. In their approach to the evidence, the High Court has done injustice to the witnesses and this has resulted in a grave miscarriage of Justice. In appreciating oral evidence, the question in each case is whether the witness is a truthful witness and whether there is anything to doubt his veracity in any particular matter about which he deposes. Where the witness is found to be untruthful on material facts that is an end of the matter. Where the witness is found to be partly truthful or to spring from tainted sources, the Court may take the precaution of seek-

ing some corroboration, adequate and reasonable to meet the demands of the situation, but a court is not entitled to reject the evidence of a witnesses merely because they are government servants who, in the course of their duties or even otherwise, might have come into contact with investigating officers and who might have been requested to assist the investigating agencies. If their association with the investigating agencies is unusual, frequent or designed, there may be occasion to view their evidence with suspicion. But merely because they are called in to associate themselves with the investigation as they happened to be available or it is convenient to call them, it is no ground to view their evidence with suspicion. Even in cases where officers who, in the course of their duties generally assist the investigating agencies there is no need to view their evidence with suspicion as an invariable rule. For example in rural areas, investigating officers would ordinarily think of calling in the village officers, such as, the Headman, the Patel or Patwari to act as panch-witnesses, as they are expected to be respectable persons of the locality. This does not mean that their evidence should be viewed with suspicion because they are government servants or because they are generally associated with investigating agencies whenever there is a crime in the village. For that matter it would be wrong to reject the evidence of police officers either on the mere ground that they are interested in the success of the prosecution.



ution. The court may be justified in looking with suspicion upon the evidence of officers who have been demonstrated to have displayed excess of zeal in the conduct and success of the prosecution. But to reject the evidence of official witnesses as the High Court has done in the present case, is going far. We think that it is extremely fair to a witness to reject his evidence by merely giving him a label.

6. There were two panch witnesses Parikh and Panchal of whom Parikh has been examined as P. W. 3 while Panchal has not been examined. We have taken through the whole of the deposition of Parikh and we find nothing whatever to doubt his veracity. Nothing was suggested to him as to why he should give such evidence to implicate the accused. That was elicited from him was that he had worked as departmental inquiry officer and also to defend delinquents in such inquiries in his department. He had become acquainted with Inspector Sharma fifteen days before March 14, 1972 as he was defending a delinquent at Bhavnagar in a case in which Shri Sharma was the prosecuting officer. Shri Panchal, who was Assistant Superintendent of Post Offices, Bhavnagar was the Inquiry Officer in that case. This is stated to be the "close association" of the two panch witnesses with the investigating agency in this case. It is impossible to subscribe to this view. When deuja, Deputy Superintendent of Police asked Inspector Sharma to get two independent panch witnesses, Parikh was readily available in the guest house and

he had known Panchal as the Inquiry Officer in a departmental inquiry in the Postal Departmental. Both of them being Government servants belonging to a different department, if Inspector Sharma thought that they could be called as independent panch witnesses we are unable to impute any motives to the investigating agency or to cast aspersions on the witnesses Parikh and Panchal. We do not have any doubt in accepting the evidence of Parikh as that of an independent witness. Having examined his evidence in detail, we find his evidence to be truthful. His evidence substantiates the evidence of P. W. 2 about the acceptance of the bribe by the accused and his keeping the money in a folded newspaper. If we accept the evidence of P. Ws 2 and 4, the prosecution case that the money was given as a bribe must be accepted and the defence version that the money was planted must be rejected.

7. The other circumstances upon which the High Court relied are very trivial and it is unnecessary to burden this judgement with a seriatim discussion of those circumstances. For example, one of the circumstances was that if the accused had arranged that P. W. 2 should come to him on the evening of 14th with the bribe, he would have been waiting in his house to receive him with the doors of the house open so that the bribe-giver may walk in straight and he was not likely to have kept the doors closed and wait for bribe-giver to knock at the door. We consider it needless



even to comment upon this circumstance. Another circumstance upon which the High Court relied was that the accused was not likely to have talked with P. Ws 2 and 3 for as long as 40 minutes if he was accepting a bribe. He would have merely received the money and sent them away. The very fact that he was talking to them for nearly 40 minutes indicated that no bribe was given or taken. On the other hand, we consider that this is a strong circumstance against the accused. The accused knew that P. W. 2 was an assessee who had a pending case before him. If the assessee paid him a visit after 8.00 P.M. at his residence, one would expect the accused to immediately suspect the reason for the visit and to turn him away at once or at least within a few minutes after his coming to his house. Instead of that, he takes them inside the house, talks to them for nearly 40 minutes. This conduct of the accused is clearly against his innocence. Some question was raised that the solution which according to the investigating officer and the panch witness turned pink when the accused was asked to dip his fingers in it, had become yellowish when the chemical examiner examined the solution. Nothing really turns on this in view of the evidence of P. Ws. 2 and 4 that of the investigating officer P. W. 9.

8. A point was sought to be made in this court of the failure of the prosecution to examine Inspector Sharma as a witness. All that Inspector Sharma did in the case was to assist Jadeja, Deputy Superintendent of Police

and to fetch the two panch witnesses when he was asked to do so. He could not by any means be called a material witness. As some comment was made during the course of the trial about the failure of the prosecution to examine Inspector Sharma, the prosecution offered him for cross examination and kept Inspector Sharma ready in court. The counsel for the accused stated that since the witness had already been dropped by the prosecution, he did not want to examine him unless the court directed him to do so. After the failure of the counsel for the accused to take advantage of the offer made by the prosecution, we do not think that it is open to the accused to comment upon the so-called failure of the prosecution to examine Inspector Sharma as a witness. Nor can we draw any adverse inference against the prosecution. On this question, the High Court took the same view as we do.

9. From the evidence of P. Ws 2 and 9, we do not have the slightest doubt that a sum of Rs. 12,500/- was paid to and received by the accused as a bribe. The learned Sessions Judge was clearly right in convicting the accused and the High Court was wrong in acquitting the accused. We do not think that is a case where two views were reasonably possible. The only possible view was that the accused was guilty and we hold him guilty of both the offences under S. 161 IPC and S. (2) read with S. 5 (1) (d) of the Prevention of Corruption Act, 1947. The learned counsel for the accused argued that



**O. Chinnappa Reddy**  
**Judge**  
**Supreme Court of India**

in view of the long time that has elapsed since the commission of the offence and in view of the circumstance that the accused has also retired from service, we may take a lenient view and not sentence the accused to any term of imprisonment. But under S.5 (2) of the Prevention of Corruption Act, 1947, the minimum sentence that can be imposed is imprisonment for one year and the maximum sentence is seven years. However the court, for any special reasons to be recorded in writing, may impose a sentence of imprisonment of less than one year. We are unable to find any special circumstance in this case justifying our taking a lenient view. Corruption has become so

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rampant in the country and the offence in this particular case cannot be considered trivial at all. This is not a case of a petty clerk or a peon accepting a small amount as a bribe for doing some little favour. We cannot possibly take a lenient view of the conduct of an income tax officer, who accepts a large amount as a bribe for causing loss to public revenue. We think that the sentences imposed by the learned Sessions Judge were the right sentences to be imposed on the accused. The judgement of the High Court is set aside and that of the learned Special Judge is restored. The accused will surrender to his bail.

Appeal allowed.



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**D. A. Desai**  
**Judge**  
**Supreme Court of India**

### **OBSERVATION**

**Reinstatement and entitlement of back salary—Suspension for criminal prosecution—Dismissal after conviction—Reinstatement after acquittal in appeal—1/4th salary with held for suspension period—Suit for—Constitution of India, Art. 311.**

### **OBSERVED BY**

**Mr. D. A. Desai, Mr. R.B. Misra and**  
**Mr. Ranganath Misra**  
**Hon'ble Judges, Supreme Court of India**

### **IN**

**Civil Appeal No. 730 of 1978 decided on 29-11-1983, in the case of Brahma Chandra Gupta, Appellant v. Union of India, Respondent.**

### **TEXT**

**Judgement:—**This appeal by special leave arises from a judgement of the High Court of Allahabad confirming the decision of the District Judge in appeal reversing the decree passed by the trial Court in favour of the appellant.

2. Appellant was working as a permanent Upper Division Clerk in the Defence Accounts Department at the relevant time. It appears that one Nathu Singh was wanted in a dacoity case. On 4-5-62 around about 4.00 the Investigating Officer received an information that Nathu Singh was present in the premises in possession of the present appellant and this information led to a search of the premises occupied by him. The search and the consequent seizure led to the prosecution of the appellant for two distinct offences, one under Section 19(F) of the Indian Arms Act and another under

Section 5 of the Indian Explosive Substances Act. Pending the investigation appellant was suspended from service with effect from May 14, 1962, the order having been passed on May 5, 1962. The order of suspension simultaneously provided that appellant would be entitled to draw subsistence allowance equal to leave salary which he would have drawn had he been on leave on half pay together with admissible dearness allowance. Appellant was tried in the Court of the Magistrate, 1st Class, Shahjahanpur for the offence under S. 19 (F) of the Indian Arms Act and was convicted and sentenced to suffer imprisonment for a period of one and half years as per the judgement dated September 15, 1964. The conviction led to the order dismissing the appellant from service effective from October 31, 1964. Appellant preferred an appeal against his conviction



and sentence. The appeal was allowed as per the judgement dated October 31, 1964 and appellant was held not guilty of the offence which he was charged and he was acquitted. On being acquitted the appellant was reinstated in service effective from September 3, 1965. While ordering reinstatement in service the concerned authority was required to decide how the period of suspension should be treated. The question was to be decided in light of the provision contained in Article 193 of the Civil Service Regulation. The concerned authority divided the period of suspension of the appellant into two parts, the first being from May 14, 1962 to October 31, 1964 when appellant was acquitted and the second being from October 31, 1964 to September 3, 1965 when he was reinstated in service. With regard to the latter part the concerned authority directed the payment of full salary after giving credit for the suspension allowance that was drawn by him and there is no dispute between the parties about it. The question then remained with regard to the period from May 14, 1962 to October 31, 1964. For this period the concerned authority was of the opinion that the appellant could not be said to be fully exonerated and therefore, a direction was given that the appellant should be given 3/4th of his salary for the period of suspension. The consequence was that for the aforementioned period 1/4th of his salary was not paid to appellant. The appellant filed Suit No 210 of 1968 in the Court of the 2nd Civil Judge, Kanpur against

the Union of India contending that he was never hauled up for departmental enquiry and he was suspended only on the ground that a criminal charge was laid against him and pending trial of the offence, and therefore Article 193 would not be attracted and accordingly it was not open to the authority concerned to deny him full salary for the period of suspension. Alternatively it was contended that in the circumstances of the case he was deemed to have been fully exonerated and therefore all the order withholding 1/4th of the salary was not sustainable.

3. After all these elaborate pleadings and fifteen years of litigation the claim made in the suit was ridiculous low in the amount of Rs. 3595.07 p.

4. The learned trial Judge accepted the case of the plaintiff-appellant and decreed the suit with costs. Surprisingly though not unusual these days, for the paltry sum the Union of India carried the matter in appeal. We find it difficult to appreciate this litigious attitude against a clerk in lower echelon of service more when no principle was involved. It may be that the Union of India wanted the Court to consider the true ambit and scope of Article 193 and therefore, the appeal may have been preferred. The learned District Judge was of the opinion that in the circumstances of the case the appellant could not be said to be fully exonerated and accordingly reversed the judgement and decree of the trial Court and dismissed the suit. After an unsuccessful appeal to the High Court, the appella



**D. A. Desai**  
**Judge**  
**Supreme Court of India**

as filed this appeal by special leave petition.

5. The appellant was suspended in 1962 and we are now in 1983 when the appellant prays for a decree for Rupees 5,595.07 P. During the passage of the time the purchasing power of this amount must have been considerably reduced by now.

6. Mr. R.K. Garg, learned counsel for the appellant wanted us to examine the scope and ambit of Article 193 and Mr. Gujral learned counsel for the Union of India was equally keen on the other side to do the same thing. We steer clear of both. The appellant was a permanent UDC who has already retired on superannuation and must receive a measure of socio-economic justice. Keeping in view the facts of the case that the appellant was never hauled up for departmental enquiry, that he was prosecuted and has been ultimately acquitted, and on being acquitted, he was

reinstated and was paid full salary for the period commencing from his acquittal, and further that even for the period in question the concerned authority has not held that the suspension was wholly justified because 3/4th of the salary is ordered to be paid, we are of the opinion that the approach of the trial Court was correct and unassailable. The learned trial Judge on appreciation of facts found that this is a case in which full amount of salary should have been paid to the appellant on his reinstatement for the entire period. We accept that as the correct approach. We accordingly allow this appeal, set aside the judgement of first appellate Court as well of the High Court and restore the one of trial Court with this modification that the amount decreed shall be paid with 9% interest p. a. from the date of suit till realisation with costs throughout.

Appeal allowed.



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A. N. Sen  
Judge  
Supreme Court of India

### OBSERVATION

Constitution of India. Article 136—Airman employed in Air Force—On expiry of period of service of 9 years, filing an application for extension of term of service by another six years under relevant regulations—Authorities on the basis that applicant was accused in criminal case and was likely to be convicted of charge of theft passing an order of discharge considering him unsuitable—Applicant, however, acquitted of charge of theft subsequently—On facts of case, applicant-appellant, held, was entitled to be compensated by payment of lump sum amount in lieu of benefits to which he would have been entitled had he continued in service for extended period of 6 years.

### OBSERVED BY

Mr. Amarendra Nath Sen and  
Mr. Ranganath Misra  
Hon'ble Judges, Supreme Court of India

### IN

Civil Appeal No. 727 of 1978, decided on 15-9-1983 in the case of Sohan Singh, appellant v. Union of India and another, Respondents.

### TEXT

Amarendra Nath Sen, J. :— The appellant was employed in the Air Force as an airman. On the expiry of the period of service of 9 years the appellant under the terms of the relevant provisions of the regulation made an application for the term of his service being extended by another 6 years. Unfortunately for the appellant got involved in a criminal case in relation to theft of certain Mig Batteries. The authorities concerned after holding an enquiry decided to hand over the Case to the Municipal Court instead of trying the appellant by Court Martial. Before any order had been passed

on the said application of the appellant for extension of his term the appellant continued in service for a further period of one year in view of the provisions of DI Rules As the appellant happened to be an accused in the criminal case the authorities concerned on the basis that the appellant was an accused in a criminal case and was likely to be convicted of the charge of theft, discharged the appellant considering the appellant to be unsuitable by order dated 6-4-1973. The appellant was, however, actually discharged on 19-11-1973. Against this order of discharge the appellant filed a writ



petition in the Delhi High Court which was dismissed by the Delhi High Court and the appellant has preferred this appeal with leave granted by this Court. After the dismissal of the writ petition by the Delhi High Court the criminal case against the appellant was finally disposed of and the appellant was acquitted of the charge of theft on 8-11-1976.

2. We have heard the learned counsel for the parties. We have also carefully considered the materials which have been placed before us.

3. It appears that on an earlier occasion when then the appeal came up for hearing the authorities had agreed in Court to delete from the order of discharge the words "unsuitable for retention in Air Force (on disciplinary grounds)" and had further agreed to pay to the appellant Service Gratuity and Death-cum-Retirement Gratuity admissible under Pension Regulations of the Air Force, 1961 Part I for the period of qualifying service in the Air Force up to the date of his discharge.

4. On a careful consideration of the materials we are satisfied that the order of discharge of the appellant was passed mainly on the ground that the criminal case against the appellant was pending and the authority concerned was of the opinion that the appellant was likely to be convicted in that particular case. The materials on record clearly indicate that the pendency of the criminal case against the appellant and the possibility of the appellant

being convicted of the said charges greatly weighed with the authority and had influenced its decision in directing the discharge of the appellant. The order of the Commanding Officer recommending discharge on the ground that the appellant was not suitable, records that the appellant was likely to be convicted'. We have no hesitation in coming to the conclusion that if the order of acquittal had been pronounced before the date of the order of discharge of the appellant; the authority concerned would have allowed the application for extension of the term of service of the appellant. If extension had been allowed, as in the normal course it would have been granted if the order of acquittal were there at the relevant time, the appellant would have been entitled to continue in service for a further period of six years in the usual course. During the said period of six years the appellant in view of the provisions of the Rules had in fact served for a period of over a year before he was actually charged.

5. It appears that after the discharge of the appellant the authorities concerned had given a certificate of good conduct to the appellant. That certificate is at p. 36 of the paper book read as follows :—

"This is to certify that 251906 Corporal (non-commissioned officer) So Singh Fitter II Air Force has been serving in the Indian Air Force Since October, 1963).

2. During his services he has been loyal and dutiful. He had pro-



Report No. 91, p. 03

A. N. Sen

Judge

Supreme Court of India

himself a technician of high calibre. He has been assessed as Superior in his grade efficiency and very good character.

I wish him all success.

Sd/ (D. Keelor) Vr.C.

Wing Commander

officer Commanding

No 4, Squadron, A.F.

Dated September 19, 1973"

6. Taking into consideration the peculiar facts and circumstances of this case we are, therefore, of the opinion that the justice of the case requires that the appellant should be compensated by payment of a lump sum amount in lieu of the benefits to which he would have been otherwise entitled, if he had continued in service for the extended period of 6 years. However, without going into the merits

of the actual claim of the appellant for this particular period we are of the opinion that the ends of justice will be sufficiently met if we direct the authorities concerned to pay to the appellant a sum of Rs. 35,000/- by way of compensation. This amount will be paid in addition to the amounts which are to be paid to the appellant by way of Service Gratuity and Death-cum-Retirement Gratuity. The amount will be paid to the appellant within one month from today. The authority concerned is further directed to delete from the order the words 'unsuitable for retention in Air Force (on disciplinary grounds)'.

7. The appeal is disposed of accordingly. There will be no order as to costs.

Appeal allowed



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### OBSERVATION

(A) Departmental enquiry—Employee acquitted in criminal case—Enquiry whether can be continued—Constitution of India, Article 311.

(B) City of Nagpur Corporation Act (2 of 1950), Section 59 (3) (b)—Special functions of Chief Executive Officer—Expression 'control'—Connotation of—Suspension of Municipal employees pending departmental enquiry—Municipal Commissioner is competent. Spl. Civil Appln. No. 1501 of 1977, D/- 3-10-79 (Bom.) Reserved. (Words and phrases—Control).

### OBSERVED BY

Mr. S. Murtaza Fazal Ali,  
Mr. A. Varadarajan and  
Mr. V. B. Eradi  
Hon'ble Judges, Supreme Court of India

### IN

Civil Appeal No. 369 of 1980, decided on 26-2-1981 in the case of Corporation of the city of Nagpur, Civil Lines, Nagpur and another, Appellants v. Ramchandra G. Godak and others, Respondents.

### TEXT

Fazal Ali, J. :— This appeal by special leave is directed against an order of the High Court of Bombay of 2/3rd October, 1979 by which an order passed suspending the two respondents was quashed on the ground that the order of suspension pending a departmental enquiry was passed by the Municipal Commissioner who was not competent to suspend the respondents pending a departmental inquiry. The High Court was of the view that under the Rules and bye-laws of the City of Nagpur Corporation Act 1984 (hereinafter referred to as the 'Act') as amended up-to-date, the Municipal Commissioner was not the competent authority to pass order of suspension against the respondents was the

Corporation itself and not the Chief Executive Officer. It appears that originally the order of suspension was passed by the Municipal Commissioner on the 23rd September, 1974 which was confirmed by the Corporation by its order dated 23rd September, 1974. It is alleged by the respondents that latter order was not communicated to them. The suspension was ordered in connection with a departmental inquiry relating to two accidents which occurred during the construction of a stadium called the Yeshwant Stadium, which was being looked after by the respondents and which resulted in the death of seven persons and injuries to eight others. A complaint was also



filed before the police as a result of which a charge-sheet under Section 304-A IPC was filed against the respondents, on the 25th September, 1976. In view of the charge-sheet submitted by the police an order of suspension was passed by the Municipal Commissioner on 13-1-77 with effect from 8-10-76. The respondents filed an appeal to departmental appellate authority which was dismissed on the 20th July, 1977. Thereafter, the respondents filed a writ petition in the High Court which allowed the petition and quashed the order of suspension and directed the respondents to be paid their full salary and further directed the re-instatement of the respondents. Hence this appeal.

2. The short point taken by Mr. Sanghi was that under Section 59 (3) of the Act, the Municipal Commissioner is the competent authority to suspend the respondents pending a departmental inquiry. On a perusal of Section 59 (3) we are of the opinion that the contention is well founded and must prevail. Section 59 (3) may be extracted thus :

“Section 59 (3) : Subject, whenever it is in this Act expressly so directed the approval or sanction of the Corporation or of the Standing Committee, and subject also to all other restrictions, limitations and conditions imposed by this Act, the entire executive power for the purpose of carrying out the provisions of this Act vests in the Commissioner who shall also —

(a) ... ..

(b) exercise supervision and con-

trol over the acts and proceedings of municipal officers and servants, and subject to the rules or bye-laws for the time being in force, dispose of all questions relating to the services of the said officers and servants and their pay, privileges and allowances.”

3. Thus Clause (b) of Section 59 (3) in express terms authorises and cloths the Municipal Commissioner with the power to exercise supervision and control over the acts of Municipal officers and servants. It may be noticed that the said Clause (b) is preceded by the words ‘vests in the Commissioner.’ When the words ‘control’ and ‘vests’ are read together they are strong terms which convey an absolute control in the authority in order to effectuate the policy underlying the rules and makes the authority concerned the sole custodian of the control of the servants and officers of the Municipal Corporation. In the case of *State of West Bengal v. Nripendra Nath Bagchi*, (1966) 1 SCR 771 : (AIR 1966 SC 447) while interpreting a similar language employed in Article 235 of the Constitution of India which confers control by the High Court over District Courts, this Court held that the word ‘control’ would include the power to take disciplinary action and all other incidental or consequential steps to effectuate this end and made the following observations.

“The word ‘control’, as we have seen, was used for the first time in the Constitution and it is accompanied by the word ‘vest’ which is a strong word



**S. M. Fazal Ali**  
**Judge**  
**Supreme Court of India**

shows that the High Court is made the sole custodian of the Control over the judiciary. Control, therefore, is not merely the power to arrange the day to day working of the court but contemplates disciplinary jurisdiction over the presiding Judge."

.....  
 "In our judgement, the control which is vested in the High Court is a complete control subject only to the power of the Governor in the matter of appointment (including dismissal and removal) and posting and promotion of District Judges. Within the exercise of the control vested in the High Court' the High Court can hold enquiries, impose punishments other than dismissal or removal....."

This view was reiterated in Chief Justice of High Court of Andhra Pradesh v. V.V.S. Krishnamurthy. (1979) 1 SCR 26 : (AIR 1979 SC 193). Where this Court clearly held that 'control' included the passing of an order of suspension and that the power of control was comprehensive and effective in operation. In this connection, Sarkaria, J. speaking for the Court, observed as follows :—

"The interpretation and scope of Article 235 has been the subject of several decisions of this Court. The position crystallised by these decisions is that the control over the subordinate judiciary vested in the High Court under Art. 235 is exclusive in nature, comprehensive in extent and effective in operation. It comprehends a wide variety of matters. Among others, it includes :

(a) (i) Disciplinary jurisdiction and a complete control subject only to the power of the Governor in the matter of appointment, dismissal, removal, reduction in rank of District Judges, and initial posting and promotion to the cadre of District Judges. In the exercise of this control, the High Court can hold inquiries against a member of the subordinate judiciary, impose punishment other than dismissal or removal.....

(ii) In Article 235, the word 'control' is accompanied by the words "vest" which shows that the High Court alone is made the sole custodian of the control over the judiciary. The control vested in the High Court, being exclusive, and not dual, an inquiry into the conduct of a member of judiciary can be held by the High Court alone and no other authority.

(iii) Suspension from service of a member of the judiciary with a view to hold a disciplinary inquiry."

4. It is thus now settled by this Court that the term 'control' is of a very wide connotation and amplitude and includes a large variety of powers which are incidental or consequential to achieve the powers vested in the authority concerned. In the aforesaid case, suspension from service pending a disciplinary inquiry has clearly been held to fall within the ambit of the word 'control'. On a parity of reasoning, therefore, the plain language of Clause (b) of Sec. 59 (3), as extracted above irresistibly leads to the conclusions that the Municipal Commissioner was fully competent to suspend the respondents pen-



ding a departmental inquiry and hence the order of suspension passed against the respondents by the Municipal Commissioner did not suffer from any legal infirmity. The High Court was, therefore, in error in holding that the order of suspension passed by the Municipal Commissioner was without jurisdiction. In this view of the matter the order of the High Court cannot be maintained and has to be quashed.

5. We might, however, mention that although in the criminal case, chargesheet was submitted as far back as September, 1976 we understand that no charges have been framed so far. Criminal cases should be disposed of as quickly as possible so as to protect the accused from unnecessary harassment. We therefore direct the Judicial Magistrate, First Class of Nagpur, to dispose of the Criminal Case No. 1902 of 1976 pending in his file with the utmost expedition and if possible within six months from today. Mr. Sanghi, on behalf of the Municipality, states that he wilfully co-operated with the prosecution in producing all the available evidence before the court and bringing the case to a final conclusion within the period mentioned above.

6. The other question that remains is if the respondents are acquitted in the criminal case whether or not the departmental inquiry pending against the respondents would have to continue. This is a matter which is to be decided by the department after considering the nature of the findings given by the criminal court. Normally where the accused

is acquitted honourably and completely exonerated of the charges it would not be expedient to continue a departmental inquiry on the very same charges on the same grounds or evidence, but the fact remains, however, that merely because the accused is acquitted, the power or the authority concerned to continue the departmental inquiry is not taken away nor is its direction (discretion) in any way fettered. However, as quite some time has elapsed since the departmental inquiry had started the authority concerned will take into consideration this factor in coming to the conclusion if it is really worthwhile to continue the departmental inquiry in the event of the acquittal of the respondents. If, however, the authority feels that there is sufficient evidence and good grounds to proceed with the inquiry, it can certainly do so. In case the respondents are acquitted, we direct that the order of suspension shall be revoked and the respondents will be reinstated and allowed full salary thereafter even though the authority chooses to proceed with the inquiry. Mr. Sanghi states that if it is decided to continue the inquiry, as only arguments have to be heard and orders to be passed, he will see that the inquiry is concluded within two months from the date of the decision of the criminal court. If the respondents are convicted, then the legal consequences under the rules will automatically follow.

7. We might mention that at the time when special leave was granted by this Court, it was ordered that the respondents should be paid a lump sum of



Rs. 10,000/- each apart from the 75% allowance. We think that in the interest of justice the department may not insist on the refund of the amount of Rupees 10,000/- until the result of the departmental inquiry and if the departmental inquiry concludes in their favour, the amo-

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unt will be either refunded or adjusted against their dues.

8. With these observations, the appeal is accepted and the judgement of the High Court is quashed. Parties will bear their own costs throughout.

Order accordingly.



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**E. S. Venkataramiah**  
**Judge**  
**Supreme Court of India**

### OBSERVATION

**Constitution of India, Art. 311 (2)—Order of discharge merely a camouflage for an order of dismissal for misconduct—Reasonable opportunity to defend not given—Order is liable to be struck down. Decision of Delhi High Court, D/-30-8-1982, Reversed.**

### OBSERVED BY

Mr. E. S. Venkataramiah and  
 Mr. R. B. Misra  
 Hon'ble Judges, Supreme Court of India.

### IN

Civil Appeal No. 3040 of 1982, decided on 24-1-1984 in the case of Anoop Jaiswal, Appellant v. Government of India and another, Respondents.

### TEXT

Venkataramiah, J.—June 22, 1981  
 is really a bad day for the appellant  
 Anoop Jaiswal who having been selected  
 by the Union Public Service Commission  
 for appointment in the Indian Police  
 Service was undergoing training as a  
 probationer at the Sardar Vallabhbhai  
 Patel National Police Academy, Hyde-  
 rabad along with other probationers. On  
 that day all the probationers were expe-  
 cted to be present at 5.50 A. M. at the  
 field where the ceremonial drill practice  
 was to be conducted. Since it was rain-  
 ing at that time it appears that the venue  
 was shifted to the Gymnasium Hall where  
 it was proposed to conduct P. T./unarmed  
 combat practice and intimation was sent  
 to the trainees at the Mess. When the  
 Assistant Director (Outdoor Training)  
 reached the Gymnasium at 5.50 A. M.  
 none of the probationers had reached

there. They all reached the place 22  
 minutes late i. e. by 6.15 A. M. when the  
 rains had abated and the parade commen-  
 ced at 6.15 A. M. It appears that earlier  
 when a messenger sent by the Assistant  
 Director had gone to call the probationers  
 they had asked for a vehicle to the place  
 as it was raining. The delay was conside-  
 red as an incident which called for an  
 enquiry. Explanation was called from all  
 the probationers. The appellant was  
 considered to be one of the ring leaders  
 who was responsible for the delay. When  
 the appellant was asked about the inci-  
 dent he gave his explanation to the Dire-  
 ctor of the National Police Academy  
 which read thus;

“To,  
 The Director,  
 National Police Academy,  
 Hyderabad,

Dear Sir,



In reply to your Memo. dated 22nd June, 1981 I humbly submit that as for my being late in P. T. by 10 mts. I sincerely regret the lapse. But the second charge that I instigated others to do so is totally baseless and without a single iota of truth. I request you Sir to make a thorough enquiry into such an allegation. I never had nor have such plebeian mentality.

Thanking you,

Yours sincerely,

Sd/-

Anoop Jaiswal

2. It would appear that the Director without holding an enquiry into the alleged misconduct recommended to the Government of India that the appellant should be discharged from the service. On the basis of the above report the Government of India passed the order of discharge dated November 9, 1981 and communicated it to the appellant. The material part of the order reads thus:

“No. 1-22011/9/81-Pers. III Government of India/Bharat Sarkar Ministry of Home Affairs/Grih Mantralaya.

.....  
 New Delhi-110001, the 9th Nov. 1981  
**ORDER**

Whereas the Central Government is satisfied that Shri Anoop Jaiswal, appointed to the Indian Police Service on probation on the result of the Civil Service Examination held in the year 1979, is unsuitable for being a member of the said service, he is hereby discharged under clause (b) of Rule 12 of the Indian Police Service (Probation) Rules, 1954.

The order of discharge will take effect from the date on which it is served on the said Shri Anoop Jaiswal.

In the name of and on behalf of the President of India.

Sd/-

(Narendra Prasad)

Director”

3. On receipt of the above order of discharge, the appellant made a representation on November 14, 1981 to the Government of India to reconsider the matter. It appears that the Director of the National Police Academy on that occasion recommended that the appellant may be reinstated. The representation was rejected by the Government of India on April 8, 1982. Thereafter, the appellant filed a petition under Article 226 of the Constitution before the High Court of Delhi contending that the order of discharge was violative of Article 311 (1) and Article 14 of the Constitution. That petition was dismissed by the High Court at the stage of admission on August 30, 1982 after hearing the counsel for the Union of India. Against the judgement of the High Court, the appellant has filed this appeal with special leave under Article 136 of the Constitution.

4. The main contention of the appellant before us is that the order discharging the petitioner though on the face of it appears to carry no stigma is in reality an order terminating his service on the ground of misconduct alleged to have been committed by him on June 22, 1981 in acting as one of the ring leaders who were responsible for the delay of about



enty-two minutes in the arrival of the probationers at the Gymnasium and that such an order could not have been issued without holding an enquiry as contemplated under Article 311 (2) of the Constitution and the relevant rules governing such an enquiry. He has also contended that the order is based on conjectures and surmises and by way of illustration he has referred us to paragraph 13 of the counter-affidavit which reads thus :

“Para 13 :

The petitioner did not conduct himself fully in accordance with the prescribed rules and regulations during his training period. On one occasion when he was sanctioned leave for 16 days in the month of May, 1981, he did not report himself for duty in time. He absented himself wilfully on 1-6-1981 without applying for leave for the day. For his action, he was warned by the Director against recurrence, of such conduct. The period of his wilful absence for one day was treated as leave without pay. On two earlier occasions, the petitioner's conduct was found prejudicial to good order and discipline, on the first occasion he was verbally counselled by the Chief Drill Instructor and on the second occasion a Memo was issued to him.

There was no gradation maintained in the Academy about the attendance, in terms of which the petitioner had the record of being second (or may third) highest in the Academy.

However, this record in this respect is otherwise satisfactory.”

5. The reply of the appellant to the above allegation is found in paragraph 6 of the rejoinder affidavit filed by the appellant which reads :

Re : Para 13 : The averments made in para 13 of the petition are reiterated and the contentions of the respondent to the contrary are denied as incorrect. It is reiterated that the petitioner conducted himself fully in accordance with rules and regulations. The allegation made by the respondent that I absented myself wilfully on 1-6-1981 without applying for leave for the day is highly misleading. The correct fact is that I was sanctioned my Earned Leave on 15-5-81 for a period of 16 days, and I was to report back for duty on 1-6-81 before 12.00 noon. I made arrangements to reach Hyderabad before 8.00 a. m. on 1-6-1981. However, on account of late running of train in which I was travelling and consequently missing the connecting train, I could reach Hyderabad only around noon and I reported at 1.00 p. m. All these facts were duly explained to the Asstt. Director, Outdoor Training, and he permitted me to attend the afternoon classes on 1-6-81 which I did. (However, at his suggestion, I applied for leave for the day and the leave was sanctioned without pay). It is incorrect to say that I was warned for this. All that the Director said was that on such situations, the proper course was to apply for a day's leave which I did as stated earlier. It is, therefore, very unreasonable to characterise the said incident as wilful absence. The further allegation that on the earlier



occasions, the petitioner's conduct was found prejudicial to good order and discipline, is very vague and without any particulars. Counselling by the Instructor concerned is a routine affair and, in fact, the Instructors are meant to counsel. Even regarding the second occasion, when a memo was said to have issued, it is not stated as to what the offence was. It is significant to note that the respondent has not denied the allegation made by me that I was not the only one who received such memos and that without exception all the probationary officers has at some time or the other received such memos. I deny the rest of the allegations and reiterate the averments made in para 13 of the petition."

6. The learned counsel for the parties have cited a number of decisions before us in support of their respective cases. On going through them we are of the view that there is not much divergence in them as to the true legal principles to be followed in matters of this nature but the real problem appears to be one of application of those principles in a given case in determining whether the particular action taken amounts to a punishment attracting Article 311 (2) of the Constitution or mere discharge simpliciter not requiring the holding of an enquiry as contemplated under Article 311 (2). We shall now deal with two leading cases having a bearing on the question before us. In *Parshotam Lal Dhingra v. Union of India* 1958 SCR 828 : this Court after an elaborate consideration of the relevant provisions of the Constitution and judicial decisions

cited before them observed.

"The net result is that it is only those cases where the Government intends to inflict those three forms of punishments that the Government servant must be given a reasonable opportunity of showing cause against the action proposed to be taken in regard to them. It follows, therefore, that if the termination of service is sought to be brought about otherwise than by way of punishment then the Government servant whose service is terminated cannot claim the protection of Art. 311 (2) and the decisions cited before us and referred to above, in so far as they lay down that principle, must be held to be rightly decided.

The foregoing conclusion, however, does not solve the entire problem, for it has yet to be ascertained as to whether an order for the termination of service is inflicted as and by way of punishment and when it is not.....

Where a person is appointed to a permanent post in a Government service on probation, the termination of his service during or at the end of the period of probation will not ordinarily and by itself be a punishment, for the Government servant, so appointed, has no right to continue to hold such a post any more than the servant employed on probation by a private employer is entitled to do. Such a termination does not operate as a forfeiture of any right of the servant to hold the post, for he has no such right and obviously cannot be a dismissal, removal or reduction



rank by way of punishment.....

It does not, however, follow that, except in the three cases mentioned above, in all other cases, termination of service of a Government servant who has no right to his post, e. g., where he was appointed to a post, temporary or permanent, either on probation or on an officiating basis and had not acquired quasi-permanent status, the termination cannot, in any circumstances, be a dismissal or removal from service by way of punishment.....

In short, if the termination of service is founded on the right flowing from contract or the service rules then, prima facie, the termination is not a punishment and carries with it no evil consequences and so Art. 311 is not attracted. But even if the Government has, by contract or under the rules, the right to terminate the employment without going through the procedure though the procedure prescribed for inflicting the punishment of dismissal or removal or reduction in rank, the Government may, nevertheless, choose to punish the servant and the termination of service is sought to be founded on misconduct, negligence, inefficiency or other disqualification, then it is a punishment and the requirements of Art. 311 must be complied with."

7. The case of *Samsher Singh v. State of Punjab* (1975) 1 SCR 814 decided by a Bench of seven Judges of this Court directly deals with the case of a probationer who is discharged from service without complying with Article

311 (2) of the Constitution. In that case two Judicial Officers of the Punjab Judicial Service were involved. For purposes of the present appeal it is sufficient if we refer to the case pertaining to Ishwar Chand Agarwal who was at the material time serving as a probationer in the Punjab Civil Service (Judicial Branch). By an order dated December 15, 1969 his services were terminated. The said order did not contain any statement which would attach any stigma to the career of the officer concerned. It reads as follows.

"On the recommendation of the High Court of Punjab and Haryana, the Governor of Punjab is pleased to dispense with the services of Shri Ishwar Chand Agarwal, P.C.S. (Judicial Branch), with immediate effect, under Rule 7 (3) in Part 'D' of the Punjab Civil Services (Judicial Branch) Rules, 1951, as amended from time to time."

8. Rule 7 (3) of the Punjab Civil Service (Judicial Branch) Rules, 1951 relied on in the above order provided that on the completion of the period of probation of any member of the service, the Governor might on the recommendation of the High Court confirm him in his appointment if he was working against a permanent vacancy, or if his work or conduct was reported by the High Court to be unsatisfactory, dispense with his services or revert him to his former substantive post, if any or extend his period of probation and thereafter pass such orders as he could have passed on the expiry of the first period of probation. In this case Ray,



C.J. observed in the course of his Judgement thus:

“No abstract proposition can be laid down that where the services of a probationer are terminated without saying anything more in the order of termination than that the services are terminated it can never amount to a punishment in the facts and circumstances of the case. If a probationer is discharged on the ground of misconduct or inefficiency or for similar reason without a proper enquiry and without his getting a reasonable opportunity of showing cause against his discharge it may in a given case amount to removal from service within the meaning of Article 311 (2) of the Constitution.

Before a probationer is confirmed the authority concerned is under an obligation to consider whether the work of the probationer is satisfactory or whether he is suitable for the post. In the absence of any Rules governing a probationer in this respect the authority may come to the conclusion that on account of inadequacy for the job or for any temperamental or other object not involving moral turpitude the probationer is unsuitable for the job and hence must be discharged. No punishment is involved in this. The authority may in some cases be of the view that the conduct of the probationer may result in dismissal or removal on an inquiry. But in those cases the authority may not hold an inquiry and may simply discharge the probationer with a view to giving him a chance to make

good in other walks of life without stigma at the time of termination of probation. If, on the other hand, a probationer is faced with an enquiry on charges of misconduct or inefficiency or corruption, and if his services are terminated without following the provisions of Article 311 (2) he can claim protection.

9. Having said so, the learned Chief Justice proceeded to examine the facts of the case and found that an enquiry officer nominated by the Director of Vigilance had recorded statements of some witnesses behind the back of the officer concerned in respect of certain allegations of misconduct and had on that basis made a report to the High Court and that the High Court had after accepting the said report, made a recommendation to the Governor to the effect that the officer was not a suitable person to be retained in service. The order of termination was because of the recommendations in the report. Thus the learned Chief Justice observed :

“The order of termination of the services of Ishwar Chand Agarwal was clearly by way of punishment in the facts and circumstances of the case. The High Court not only denied Ishwar Chand Agarwal the protection under Article 311 but also denied itself the dignified control over the subordinate judiciary. The form of the order is not decisive as to whether the order is by way of punishment. Even an innocuously worded order terminating the service may in the fact and circumstances of the case establish that an enquiry



**E. S. Venkataramiah**  
**Judge**  
**Supreme Court of India**

allegations of serious and grave character of misconduct involving stigma has been made in infraction of the provision of Article 311. In such a case the simplicity of the form of the order will not give any sanctity. That is exactly what has happened in the case of *Chand Agarwal*. The Order of termination is illegal and must be set aside."

10. Krishna Iyer, J. who agreed with the learned Chief Justice had at the end of this judgement this to say.

"Again, could it be that if you summarily pack off a probationer, the order is judicially unscrutable and immune? If you conscientiously seek to satisfy yourself about allegation by some sort of enquiry you get caught in the coils of law, however harmlessly the order may be phrased. And so this sphinx-complex has had to give way to later cases. In some cases the rule of guidance has been stated to be 'the substance of the matter' and the 'foundation' of the order. When does 'motive' trespass into 'foundation'? When do we lift the veil of form to touch the 'substance'? When the Court says so. These 'Freudian' frontiers obviously fail in the workaday world and Dr. Tripathi's observation in this context are not without force. He says :

'As already explained, in a situation where the order of termination purports to be a mere order of discharge without stating the stigmatizing results of the departmental enquiry a search for the 'substance of the matter' will be indistinguishable from a search for the

motive (real, unrevealed object) of the order. Failure to appreciate this relationship between motive (the real, but unrevealed object) and from (the apparent, or officially revealed object) in the present context has led to an unreal interplay of words and phrases wherein symbols like 'motive,' 'substance' 'form' or 'direct' parade in different combinations without communicating precise situations or entities in the world of facts."

11. On behalf of the Union of India reliance has been placed on *State of Punjab v. Sukh Raj Bahadur* (1968) 3 SCR 234. *Union of India v. R. S. Dhaba* (1969) 3 SCC 603, *State of Bihar v. Shiva Bhikshuk Misra* (1971) 2 SCR 191 *R. S. Sial v. State of U. P.* (1974) 3 SCR 754 *State of U. P. Ram Chandra Trivedi* (1977) 1 SCR 462 1. *N. Saksena v. State of Madhya Pradesh* (1967) 2 SCR 496. We have gone through these decisions. Except the case of *Ram Chandra Trivedi* (supra) all other cases referred to above were decided prior to the decision in *Samsher Singh's* case (AIR 1974 SC 2197) (supra) which is a judgement delivered by a Bench of seven Judges. As pointed out by us in all these cases including the case of *Ram Chandra Trivedi* (supra) the principle applied is the one enunciated by *Parshotom Lal Dhingra's* case (AIR 1958 SC 36) (supra) which we have referred to earlier. It is urged relying upon the observation in *Shri Sukh Raja Bahadur's* case (supra) that it is only when there is a full scale departmental enquiry envisaged by Article 311 (2) of the Constitution i. e. an



enquiry officer is appointed, a charge-sheet submitted explanation called for and considered, any termination made thereafter will attract the operation of Art. 311 (2). It is significant that in the very same decision it is stated that the circumstances preceding or attendant on the order of termination of service have to be examined in each case, the motive behind it being immaterial. As observed by Ray, C. J. in Samsher Singh's case (*supra*) the form of the order is not decisive as to whether the order is by way of punishment and that even an innocuously worded order terminating the service may in the fact and circumstances of the case establish that an enquiry into allegations of serious and grave character of misconduct involving stigma has been made in infraction of the provision of Art. 311 (2).

12. It is, therefore, now well settled that where the form of the order is merely a camouflage for an order of dismissal for misconduct it is always open to the Court before which the order is challenged to go behind the form and ascertain the true character of the order. If the Court holds that the order though in the form is merely a determination of employment is in reality a cloak for an order of punishment, the Court would not be debarred, merely because of the form of the order, in giving effect to the rights conferred by law upon the employee.

13. In the instant case, the period of probation had not yet been over. The impugned order of discharge was

passed in the middle of the probationary period. An explanation was called for from the appellant regarding the alleged act of indiscipline, namely, arriving late at the Gymnasium and acting as one of the ring leaders on the occasion his explanation was obtained. Similar explanations were called for from other probationers and enquiries were made behind the back of the appellant. On the case of the appellant was dealt with severely in the end. The cases of other probationers who were also considered to be ring leaders were not seriously taken note of. Even though the order of discharge may be non-committal, it cannot stand alone. Though the nothing in the file of the Government may be irrelevant, the cause for the order cannot be ignored. The recommendation of the Director which is the basis of the foundation for the order should be read along with the order for the purpose of determining its true character. If on reading the two together the Court reaches the conclusion that the alleged act of misconduct was the cause of the order and that but for that incident it would not have been passed then it is inevitable that the order of discharge should fall to the ground as the appellant has not been afforded a reasonable opportunity to defend himself as provided in Art 311 (2) of the Constitution.

14- The Union of India has placed before us all the relevant material including the recommendations of the Director of the National Police Academy that the appellant may be



E. S. Venkataramiah

Judge

Supreme Court of India

reinstated. In this case, as stated above explanation was called for from the appellant and other probationers. Explanations were received and all the probationers including the appellant were individually interviewed in order to ascertain facts. Explanation submitted by him and the answers given by others had weighed with the Director before making the recommendation to the Government of India on the basis of which action was taken. The only ground which ultimately prevailed upon the Director was that the appellant had not shown any sign of repentance without informing him that his case would be dealt with leniently if he showed any sign of repentance. In fact in the very first reply he gave to the Director on being asked about the incident which took place on June 22, 1981, the appellant stated 'I sincerely regret the lapse'. Neither in the letter which the Director first wrote to the Central Government nor in the counter-affidavit filed in this Court, due importance has been given to the said expression of regret and it is further seen that no additional lapse on the part of the appellant between June 22, 1981 and the date on which the Director wrote the letter to the Central Government, which would show that the appellant had not shown any sign of repentance is pointed out, although there is a reference to his reporting to duty late on an earlier date on June 1, 1981. On going through the above record before the Court and taking into account all the

attendant circumstances we are satisfied that the Director wished to make the case of the appellant an example for others including those other probationers who were similarly situated so that they may learn a lesson therefrom.

15. A narration of facts of the case leaves no doubt that the alleged act of misconduct on June 22, 1981 was the real foundation for the action taken against the appellant and that the other instances stated in the course affidavit are mere allegations which are put forward only for purposes of strengthening the defence which is otherwise very weak. The case is one which attracted Art. 311 (2) of the Constitution as the impugned order amounts to a termination of service by way of punishment and an enquiry should have been held in accordance with the said constitutional provision. That admittedly having not been done, the impugned order is liable to be struck down. We accordingly set aside the judgement of the High Court and the impugned order dated Nov. 9 1981 discharging the appellant from service. The appellant should now be reinstated in service with the same rank and seniority he was entitled to before the impugned order was passed as if it had not been passed at all. He is also entitled to all consequential benefits including the appropriate year of allotment and the arrears of salary and allowances up to the date of his reinstatement. The appeal is accordingly allowed.

16. The appellant had to face this



case just at the commencement of his career. We have allowed his claim in the name of the Constitution. This should help him to regain his spirit and also encourage him to turn out to be public servant in the true sense of that empres-

sion.

17. Having regard to the facts and circumstances of the case, we feel that the parties should be directed to bear their own costs.

Appeal allowed



D. A. Desai

Judge

Supreme Court of India

## OBSERVATION

**Premature Retirement—Police constable—Participation in police agitation—Suspension—Constable reinstated as per decision of Supreme Court and compulsorily retired on same day—Order held, was not in public interest but to make pretence of reinstatement and get rid of the constable C. W. P. No. 137 of 1983, D/- 18-7-1983 (Punjab & Har.) Reversed. (Constitution of India Art. 311) Punjab Civil Services (Premature Retirement) Rules (1975), R. 3.**

## OBSERVED BY

Mr. D. A. Desai, and

Mr. Ranganath Misra,

Hon'ble Judges, Supreme Court of India

## IN

Civil Appeal No. 1649 of 1984, decided on 13-3-1984 in the case of Baldev Raj, ex-Constable, Appellant v. State of Punjab and others, Respondents.

## TEXT

Desai, J. :— Special leave granted.

2. It is rather unfortunate that the respondents despite the judgement of this Court in Sengara Singh v. State of Punjab (1983) 4 SCC 225 by their inaction force low paid police constables to come before this Court and occasionally devious methods are employed to circumvent the decision.

3. In Sengara Singh's case, this Court held that the State Government cannot discriminate in the matter of concerning the lapse between two government servants wholly similarly situated. This Court held as under :

“As a sequel to police agitation, the State Government dismissed about 1100 members of the Police Force on the alle-

gation that they participated in the agitation. The State Government also filed criminal prosecutions against a large number of the agitators. Subsequently, the State Government reinstated 1000 dismissed members of the Police Force in their original posts and withdrew the criminal cases against them. If the filing of the criminal cases was the distinguishing feature, which would distinguish the case of the present appellants from others, that feature has become irrelevant because the criminal cases against those who were subsequently reinstated have been withdrawn. It is not suggested that the present appellants were leaders or indulged into more violent activities. We repeatedly questioned the learned counsel



to specify the distinguishing features of the present appellants from those in whose case the Committee recommended the reinstatement and the State Government accepted the recommendations. There is not an iota of evidence which would distinguish the case of the present appellants from those who were the beneficiaries of the indulgence of the Committee and the largesse of the State. The net result has been that the present appellants have been arbitrarily weeded out for discriminatory and more severe treatment than those who were similarly situated. This discrimination is writ large on the record and the Court cannot overlook the same."

This Court directed reinstatement of the appellants in that case. It appeared that some of the members of the Police Force who could not afford the luxury of rushing to this Court, subsequently at intervals approached the Court for similar relief, and the same was invariably granted. It was also pointed out to the learned counsel for the respondent State that the State should extend the benefit of the judgement of this Court to all who are similarly situated. However, the response is unsatisfactory. This case will illustrate the same.

4. Appellant joined service as constable in the Police Force of Punjab on July 7, 1951. It was alleged that he participated in the agitation by the members of the Police Force in the year 1979. He was prosecuted for an offence under Sec. 29 of the Police Act read with Sec. 9 of the Punjab Security and F. C. M. Act. Consequent upon the launching of the

prosecution, appellant was suspended from service. But it is admitted that the prosecution was subsequently withdrawn. Thereafter, the appellant was reinstated on February 11, 1980 and on the same day he was compulsorily retired from service, after giving him notice for a period of three months in lieu of notice. The appellant contended that the order of compulsory retirement was a device to circumvent the decision of this Court and, therefore, a mere show was made of reinstating him in service and compulsorily retiring him from service on the same day. The appellant accordingly questioned the validity of the order of compulsory retirement by Civil Writ Petition No. 1137 of 1983 in the High Court of Punjab and Haryana at Chandigarh. A Division Bench of the High Court dismissed the petition in limine. Hence this appeal by special leave.

5. A notice to show cause was issued calling upon the respondents to explain why special leave should not be granted Mr. S. K. Bagga, learned counsel appeared for the respondents. When the matter came up before this Court on January 30, 1984 after perusing the counter-affidavit filed by Mr. Shri S. S. Bains, I. P. S. Senior Superintendent of Police, Sangrur, the respondents were called upon to produce the file relevant to the order of compulsory retirement of the appellant. We specifically asked the respondents to inform the court as to who proposed the compulsory retirement of the appellant and who finally accepted the proposal.



D. A. Desai

Judge

Supreme Court of India

and which public interest was sought to be served by compulsorily retiring the appellant on the same day on which he was reinstated in service. We also called upon the respondents to disclose the annual confidential reports in respect of the appellant which may have been taken into consideration in reaching the conclusion that it was necessary in Public interest to retire the appellant from service.

6. In response to this query, Shri S. Bains has filed his further affidavit in which he has stated that one Shri Rajit Singh Bhullar, IPS, the then Superintendent of Police, Sangrur passed the orders of compulsory retirement of the appellant on his own and that the relevant consideration as set out in the Punjab Civil Services (Premature Retirement) Rules, 1975 were taken into consideration at the time of passing the impugned order. This rule provides that the appropriate authority shall, if of the opinion that it is in public interest to do so, have the absolute right in giving an prior notice in writing to retire that employee on the date on which he completes twenty five years of qualifying service or attains fifty years of age or on any date thereafter to be specified in the notice."

7. Mr. S. K. Bagga, learned counsel for the respondents urged that the appellant was compulsorily retired in public interest. Public interest is an unruly horse and once it is alleged that the order was a device to circumvent the decision of this Court, it was obligatory

upon the respondents to explain why it became necessary to retire the appellant in public interest. It is true that dead wood has to be weeded out that itself should not become a cloak to wreak vengeance. The officer who passed the order of compulsory retirement has not filed his counter-affidavit explaining the circumstances in which he considered it in public interest to compulsorily retire the appellant. Mr. S. S. Bains, who has filed the counter-affidavit claims to have no knowledge of the circumstances which necessitated compulsory retirement of the appellant. It is in this background and keeping in view the fact that while the appellant was reinstated on February 11, 1980 in the forenoon, on the same day in the afternoon he was compulsorily retired from service. In effect the decision to reinstate was taken simultaneously with the decision to retire him. It is in the backdrop of these facts which left us agitated that we called upon the respondents to disclose the file in which administrative decision was taken. It may be mentioned that no privilege is claimed. The file is not shown on the specious plea that no such file is maintained. It is conceded in para 5 of the counter-affidavit that no annual confidential reports are maintained in the case of constables. This left us completely guessing as to what must have weighed with the competent authority to pass the impugned order of retirement which is a bold order merely reciting the words of the relevant rule. The order of compulsory retirement affects



the livelihood of the person in whose respect the order is made and it cannot be left to the guess work to decide what prompted the making of such an order. We are disinclined to accept the submission that no file was maintained. In the absence of any record and the annual confidential reports, it must be confessed that there was no material before the competent authority to pass the impugned order. When in view of the judgement of this Court it became obligatory to reinstate the appellant service, the power to order compulsory retirement was exercised not in public interest but to make a pretence of ins-tatement and to get rid of the appellant.

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The High Court, in our opinion, was clearly, in error in dismissing such petition in limine. Accordingly, the appeal succeeds and is allowed and the order of compulsorily retiring the appellant from service dated February 11, 1980 is quashed and set aside. If the appellant has not reached the age of superannuation, he must be reinstated in service. If he had reached the age of superannuation, he should be paid the salary, wages and other terminal benefits for the period February 11, 1980 to the date of his superannuation. The respondents shall pay the costs of the appellant quantified at Rs. 1,000/-

Appeal allowed



D. A. Desai

Judge

Supreme Court of India

## OBSERVATION

(A) Constitution of India, Arts, 311, 16 — Memo No. O/66/II-233-1938, D/-1940—Seniority—Determination—Confirmation following initial official appointment—Officiating service rendered prior to approval cannot be considered unless contrary rule is shown—Khandasari Inspectors—Provisional seniority list drawn from date of approval of their appointment by Public Service Commission, held, was invalid.

## OBSERVED BY

Mr. D. A. Desai and Mr. A. P. Sen  
Hon'ble Judges, Supreme Court of India

## IN

Writ Petns. Nos. 5105-13 of 1983. Decided on 18-7-1984 in the case of G. P. Dova and others, Petitioners v. Chief Secretary, Govt. of U.P. and others, Respondents.

## TEXT

Desai J. :—The petitioners in this group of petitions under Art. 32 of the Constitution were inducted as Khandasari Inspectors between March 1960 and April 1960. Respondents 4 to 19 were also recruited as Khandasari Inspectors on different dates. Respondents 1 and 2 are the Chief Secretary, Govt. of U.P. and the Secretary, Industries respectively of the U. P. Government and respondent No. 3 is the Sugar Commissioner of U. P. The dispute amongst the petitioners and the respondents 4 to 19 is about inter se seniority between them in the cadre of Khandasari Inspectors.

2. It appears that in the year 1958-59 the State Government framed what was styled as 'Khandasari Licensing Scheme' to regulate the supply of sugarcane to sugar factories by G. O. No. 4588 (1) dated II-A-680/59 dated November 21,

1259 Posts of Khandasari Inspectors initially designated as Licensing Inspectors were created in the pay scales of Rs. 120-250. Petitioners Nos. 1, 2 and 3 were appointed as Khandasari Inspectors between March and May, 1960. Thereafter some of the respondents were recruited as Khandasari Inspectors and some others who were recruited departmentally were approved by the Public Service Commission. On March 22, 1971, the third respondent—The Sugar Commissioner circulated a provisional seniority list of Khandasari Inspectors. The grievance of the petitioners is that some of the petitioners have been assigned lower place in the seniority list even though they were recruited earlier and have been continuously in service. To illustrate petitioners pointed out that petitioners 1 to 3 have been placed at Serial Nos. 25,



27 and 29 respectively though all of them were recruits of 1960 while respondent No. 7—J.S. Negi who was recruited on March 23, 1961 was assigned the place at serial No. 15 and respondent No. 4 O.N. Chaturvedi, who was recruited on March 23, 1961 was shown at Serial No. 6. Similarly, respondent No. 9—P. N. Rai, who was also recruited on March 23, 1961 was shown at Serial No. 17 and respondent No. 5 was shown at Serial No. 8. The petitioners further pointed out that petitioners Nos. 4, 5, 6, 7 and 8 who were recruits of 1961 have been assigned places. 30, 34, 42, 35 and 31 respectively while recruits of 1963 have scored a march over them in the provisional seniority list. The petitioners assert that when the recruitment was made in the year 1960, the post of Khandsari Inspector was not within the purview of the public Service Commission and that they were regularly recruited to posts which were temporarily sanctioned and indefinitely continued till today and therefore, in reckoning the seniority, they must be given the benefit of the length of continuous officiation. They further contend that when the post of Khandsari Inspector was later brought within the purview of the Public Service Commission, the names of the petitioners who were already recruited in service as also of some of the respondents were forwarded to the Public Service Commission for approval and except petitioner No. 9 S. P. Gupta, the names of rest of the petitioners were approved by the Public Service Commission on September 30, 1963, the relevant date in the

case of petitioner No. 9 is April 14, 1964. The petitioners assert that even assuming that their appointment would be regular after approval of the Public Service Commission, yet once such approval is granted, it would relate back to the date of appointment and the previous length of service cannot be ignored or denied in computing their seniority in the absence of any statutory rule or administrative instruction which has the force of law. The petitioners further aver that in the absence of any other statutory rule or administrative instruction for determining seniority, length of continuous officiation provides a valid principle for determining seniority. Viewed from this angle, petitioners 1 to 3 would be senior to all the respondents and the placement of the remaining petitioners vis-a-vis the respondents will have to be recomputed. On the circulation of the provisional seniority list, the petitioners submitted various representations pointing out the error in drawing-up the provisional seniority list but till this date no reply was given nor any final seniority list circulated nor reasons assigned for rejecting the representations. The petitioners further say that despite their representation, respondents 1, 2 and 3 are operating the tentative seniority list for making further promotions to the post of Khandsari Officer and Assistant Sugar Commissioner and these by so doing are being denied equality of opportunity in the matter of promotion. The petitioners accordingly question the validity and legality of the provisional seniority



**D. A. Desai**  
**Judge**  
**Supreme Court of India**

asserting that as the final seniority list is not being drawn-up and as the representations are being ignored and yet the provisional seniority list is being operated to the disadvantage of the petitioners thereby denying them equality of opportunity in the matter of promotion which action of the respondents 1 to 3 is violative of Arts. 14 and 16.

3. Kailash Narain Pandey, Additional Sugar Commissioner filed affidavit-in-opposition. It was admitted that by the Govt. Order dated November 21, 1959 temporary posts of Licensing Inspectors later redesignated as Khandsari Inspectors in the pay scale of Rs. 120-250 were created but according to him as the maximum of the scale was over Rs. 200 right from its inception, the post was within the purview of the Public Service Commission in view of Regulation 5 (a) of Appointment Department Misc. No. 99/II-B-151-60 dated January 29, 1954 issued under the Uttar Pradesh Public Service Commission (Limitation of Functions) Regulations, 1954. It was then stated that on the framing of the Khandsari Licensing Scheme, it became necessary to urgently appoint Inspectors to implement the scheme and therefore, the third respondent—Sugar Commissioner as Appointing Authority pending regular selection through open competition by the Public Service Commission proceeded to make appointments and the appointment of the petitioners were of a stop-gap or ad hoc nature and that it created no right to the post. It was admitted that petitioners Nos. 1 and 2 were recruited after

holding departmental competitive test on March 4, 1960. Petitioner No. 3, who was then working as a Clerk in Cane Union Federation Ltd., Lucknow was selected on May 24, 1960 by applying a weeding out test, Petitioners Nos. 4 to 8 were recruited after holding qualifying test and interview on 23rd March, 1961 and Petitioner No. 9 was appointed as and by way of stopgap arrangement. It was contended that the petitioners were appointed on an ad hoc and temporary basis as a measure of stopgap arrangement. It was conceded that all the petitioners except petitioner No. 9 were approved by the Public Service Commission for regular appointment in the year 1963, to be specific on 30th September, 1963 and they have continued uninterruptedly in the posts of Khandsari Inspectors. It was further averred that within a period of one year and seven months from the date of appointment of the petitioners, the State Public Service Commission selected candidates to replace the already working unapproved Licensing Inspectors on the request of the Department and sent a list of approved candidates on September 14, 1961 but only 5 out of 44 such selected candidates joined and hence the Department has to permit the petitioners to continue though according to the third respondent notices of termination of service were served on some of the petitioners. It was further pointed out that when the State Public Service Commission proceeded to recommend candidates for the post of Khandsari Inspectors, some of the petitioners applied for such posts, but their applications were



rejected at the stage of scrutiny. But on a request from the Department the State Public Service Commission entertained the applications, called the petitioners for interview and approved them. It was admitted that except petitioners No. 9 all the rest of the petitioners were approved by the Public Service Commission on September 30, 1963. Justifying the drawing-up of the tentative seniority list as being based on recommendations of Public Service Commission, it was said that the service which can be taken into consideration for determining the length of continuous officiation must commence from the date of substantive appointment and accordingly the provisional seniority list has been drawn-up keeping in view the date of approval by the Public Service Commission in respect of each candidate. It was averred that if this principle is valid for the purpose of Art. 16, there is no error in drawing-up the seniority. It was specifically stated that it was open to the Government to ignore officiating service or service rendered on appointment in an ad hoc or stopgap arrangement. It was broadly stated that before a man can claim to have his seniority determined in the cadre, he must belong to the cadre and he can only enter the cadre on substantive appointment.

4. The rival contentions would bring into focus the controversy between the parties. The impugned provisional seniority list dated March 22, 1971 is drawn-up on the length of continuous officiation determined by the date of selection/approval of each person by the State Public Service Commission. In

the process service prior to the approval by the Public Service Commission is wholly ignored while reckoning seniority with the result that the recruits of 1961 have scored a march over those who were recruited earlier in the cadre and have been uninterruptedly officiating in the post and who at a later date were approved by the Public Service Commission for appointment as Khand-sari Inspectors. The question is : where on account of exigencies of service, recruitment to a post within the purview of the Public Service Commission is made by the appointing authority, but at a later the Public Service Commission puts its seal of approval on such an appointee, whether the continuous and uninterrupted service rendered by such appointee prior to the approval by the Public Service Commission can and should be taken into computation while determining seniority based on the principle of length of continuous officiation ?

5. When a seniority list is challenged as being violative of the guarantee of equality enshrined in Arts. 14 and 16 prima facie it appears that those who came into the cadre later on scored a March over those who were already in the cadre, it would be for the authority justifying the seniority list to plead and point out the rule for determining seniority on the basis of which the list is drawn-up. If any such rule is pleaded, it would be for those impugning the seniority list to aver and establish that the alleged seniority rule is violative of the fundamental rights guaranteed by Arts



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and 16.

6. In the affidavit-in-opposition filed by the Additional Sugar Commissioner on behalf of respondents 1 to 3, it was asserted that the impugned seniority list of the Khandsari Inspectors was drawn-up on the principle of the length of continuous officiation reckoned from the date of selection/approval by the Public Service Commission in respect of each employee belonging to the cadre. It is necessary to refer to this aspect because the averment is vague and of a general nature and later on at the hearing of the petitions reliance was placed on Memo No. O-66/II-233-1938 dated January 30, 1940 ('1940 Order' in short) for sustaining the seniority. In the affidavit being conspicuously silent with regard to this order. There is not a whisper of the 1940 Order in the whole of the affidavit-in-opposition. However, if the respondents would be in a position to justify the seniority on any existing statutory rule or administrative instruction which has been invariably followed, it would not be proper to attach too much importance to the vagueness in drawing-up pleadings, shifting the stand in the course of the proceedings. It must, however, be made clear that Mr. Gopal Subramaniam, learned counsel who appeared for respondent Nos. 1 to 3 attempted to reconcile the averments in the affidavit with the oral submissions made at the hearing of the petitions by urging that when it is said in the affidavit that the seniority in respect of each member of the cadre was reckoned on the principle of length of continuous officiation

commencing from the date of selection/approval of each member by the State Public Service Commission, respondents 1 to 3 had the 1940 Order in mind.

7. It is if therefore, necessary first to examine the nature and character of the 1940 Order and whether it lays down either by way of a statutory rule or administrative instruction a binding rule of seniority for determining the seniority in the cadre of Khandsari Inspectors. If it does, it will have to be further ascertained whether upon its true construction, the relevant rule excludes any service rendered by a member of the service prior to his approval/selection by the State Public Service Commission.

8. The 1940 Order styled as a Memorandum was not annexed to the affidavit-in-opposition. A copy of it was submitted at the time of hearing of the petitions. In its preamble it proceeds to recite that in view of the 'Appointment Department Memorandum No. 233 (1) /II-38 dated July 27, 1939 the Department of Secretariat are informed that under Section 241 (1) (B) and (2) (b) of the Government of India Act, 1935, rules have to be framed for appointment to the civil services and posts and conditions of service of persons serving.' It further proceeds to state that 'the existing rules for the various provincial specialist and subordinate services under the Government should be revised so as to bring them into conformity with the provisions of the Government of India Act, 1935 and new rule should also be drawn-up for services and posts which existed prior to



April 1, 1937 but for which no rules were framed, or which have been created after that date'. The 1940 Order further recites that enquiries are being received as to the lines on which either the old existing rules have to be revised or new rules have to be framed. It then states that 'the general principles which have been accepted by Government are stated below'. Para 2 of the Order clearly brings out the nature and character of the 1940 Order, the relevant portion of which read as under :

"2 Among other things the rules should provide for the following matters."

At Item No. 11, seniority is mentioned. Elaborating how the rule about seniority should be drawn-up, the memorandum proceeds to prescribe guidelines as under :

"Seniority in service shall generally be determined from the date of substantive appointment to a service, or from the date of the order of first appointment, if such appointment is followed by confirmation. In special cases seniority may be determined in accordance with the conditions which may suit a particular service".

9. After extensively referring to the 1940 Order, it was urged on behalf of the respondents that the impugned seniority list is drawn-up keeping in view the date of appointment the date of selection/approval by the Public Service Commission, which is the relevant date for the purpose of computing seniority under G. O. of 1940 and the date of confirmation by the department and

date of promotion.

10. The first question is : does the 1940 Order lay down a binding rule of seniority in respect of Khandsari Inspectors? It may at once be made clear that the cadre of Khandsari Inspectors was first formed under 'Khandsari Licensing Scheme' which was framed somewhere in November 1959. It is difficult to believe that two decades earlier, a seniority rule for a future cadre was prescribed. It is of course open to the Government to lay down general conditions of service governing all services in the State either by rules framed under Sec. 241 of the Government of India Act, 1935 or on the advent of the Constitution under the proviso to Art. 309 of the Constitution. It must be conceded that in the absence of statutory rules, conditions of service in a particular cadre may be governed by executive instructions issued by the Government in exercise of its executive power. At any rate, 1940 Order does not purport to lay a statutory rule framed under Sec. 241 of the Government of India Act 1935 because the memorandum recites that in view of the provisions contained in Sec. 241, rules have to be framed for appointment to civil service and posts and conditions of service of persons serving. It further recites that rules will have to be framed in respect of services which may be created for the first time after the advent of the Government of India Act, 1935. The memorandum further provides that whenever there is an occasion for framing statutory rules or issuing executive instructions governing conditions of



service, there must be some uniformity in its behalf and accordingly the memorandum proceeded to point out what should generally be the contents of the rules and on what model they should be framed. Therefore, unquestionably the memorandum prescribes guidelines for framing rules governing conditions of service. The memorandum is something akin to model standing orders. At any rate it does not purport to prescribe statutory rules or executive instructions governing conditions of service. This further becomes clear from the penultimate paragraph of the memorandum in which it is stated that the principles set out in the memorandum will be generally suitable for service posts recruitment to which is conducted through the Public Service Commission and whenever the departure is made the same should be justified. Directions are given by the memorandum that the departments of the Secretariat should proceed with the revision of the existing service rules or frame rules for new service and posts under their control in accordance with the principles set out in the memorandum. The departments are directed to draw-up the draft rules and when ready they were required to be submitted for the scrutiny of the appointing department and should be accompanied by a self-contained note in which the important points and deviation from the above principles should be explained and justified. It is thus abundantly clear that the memorandum of 1940 merely prescribed guidelines for the departments of the Secretariat either to

frame statutory rules or executive instructions governing conditions of service in respect of existing services, if there are no rules or they may be modified or amended so as to bring them generally in conformity with the 1940 Order and whenever a new post or a new cadre in a service is set up to frame rules in conformity with guidelines prescribed in 1940 order. The 1940 Order does not purport to lay down conditions of service governing any cadre either specifically or generally. It provides a model and unless the model is adopted, it is commonsense to say that it is not binding. Therefore, the contention that 1940 Order prescribes binding conditions of service and which have been followed in drawing-up the seniority list does not commend to us and must be rejected.

11. Assuming that in the absence of any specific rule to the contrary having not been shown to have been adopted, the Department accepted the model as the binding one, the next question is : whether upon its true construction it permits previous service to be wholly ignored in reckoning seniority.

12. The model set out at Item No. 11 governing seniority merely enacts the well-known rule of seniority in Government Service namely, seniority being determined in accordance with length of continuous officiation. In the absence of any other rule valid for determining seniority under Art. 16 this rule of seniority being determined by



the length of continuous officiations has been accepted as valid by the courts. In a very recent opinion of this Court in *P. S. Mahal v. Union of India* (Rendered on May 23, 1984 in W. P. Nos. 157 162 of 1976) : Bhagwati, J. after referring to *Bishan Sarup Gupta v. Union of India* (1975) 1 SCR 104 : observed as under :

“There was no specific seniority rule to determine inter se seniority between the direct recruits and the promotees appointed regularly within their respective quota from and after 16th January, 1959 and though in the absence of any specific seniority rule, the Court could have applied the residuary rule based on length of continuous officiation, the Court did not do so because it felt that since the old seniority rule had ceased to operate by reason of the infringement of the quota rule, it would be for the Government to devise “a just and fair seniority rule as between the direct recruits and the promotees for being given effect to from 16th January, 1959”.

Therefore, in the absence of any specific rule of seniority governing a cadre or a service, it is well-settled that length of continuous officiation will provide a more objective and fair rule of seniority. And that is exactly what the model in the memorandum prescribes. It says that seniority in service shall generally be determined from the date of substantive appointment to a service. If the rule were to stop here, the question would arise ; what constitutes substantive appointment to a post within

the purview of the Public Service Commissions ? But the rule does not stop by merely saying that the seniority shall generally be determined from the date of substantive appointment to a service. It further provides that it may be determined commencing from the date of the order of the first appointment, but it proceeds to qualify the last clause by providing : ‘if such appointment is followed by confirmation’. In other words a rule for determining seniority may provide length of continuous officiation from substantive appointment or from the date of the order of the first appointment if such appointment is followed by confirmation. In the latter case, once confirmation is made and the service then is uninterrupted and continuous it relates back to the date of the order of the first appointment. Now model Rule 11 suggests as guidelines two independent principles for determining seniority, namely (1) seniority be reckoned from the date of substantive appointment and (2) from the date of the order of first appointment, if such appointment is followed by confirmation. Two different starting points for reckoning seniority are set out in the model and it is difficult to assume that a department adopted one and rejected the other without making a specific rule in that behalf.

13. The question that can then be posed is : what constitutes substantive appointment in a cadre which is within the purview of the Public Service Commission. Now the cadre of Khandasary Inspectors was formed in 1959. There is no material to show that at that time



was within the purview of the Public Service Commission. A vague statement was made that under the Uttar Pradesh Public Service Commission (Limitation of Functions) Regulations, 1954 any post with a sanctioned scale, the maximum of which exceeds Rs. 200/- would be within the purview of the Public Service Commission. It was therefore, said that the post of Khandsari Inspector was within the purview of the Public Service Commission. It was then urged that as the 'Khandsari Licensing Scheme' was to be promptly implemented, the appointing authority filled in the posts pending recruitment by the Public Service Commission. This statement is not borne out by the record. On May 4, 1960, 9 persons including petitioners Nos. 1 and 2 were temporarily appointed as Licensing Inspectors. The appointment order does not show that appointment was pending selection of regular candidates by the Public Service Commission. In fact, some confusion in this behalf crept in because a statement was made at the hearing of these petitions that the post of Khandsari Inspectors came within the purview of the public Service Commission in 1961. Undoubtedly, the post of Licensing Inspector was created in the first instance up to March 31, 1960, but it may be mentioned that it has continued uninterruptedly till today and has become a permanent cadre. Identical appointment order was issued in favour of petitioner No. 3 some of the petitioners including petitioners Nos. 4, 5, 6, 7 and 8 and some of the respondents including respondents Nos.

4, 5, 6, 7 and several others came to be appointed by the Order dated March 23, 1961. (Annexure 'B' to the petition). In this appointment order it was clearly stated that 'on the result of the qualifying test and interview held for the posts of Khandsari Inspectors in the months of February and March, 1961, the candidates as noted in the enclosed list are temporarily appointed as officiating Khandsari Inspectors in the scale of Rs. 120-6-210 EB-10-250 plus usual dearness allowance per month subject to final selection by Public Service Commission at any later date.' The recitals in the order do not spell-out that the appointees were to hold stop-gap arrangement till a candidate selected by the Public Service Commission is made available. On the contrary, the recitals clearly indicate that those appointees will have to face the approval test by the Public Service Commission. Now if petitioner Nos. 1 and 2 came to be appointed in 1960 and respondents 4, 5 and 6 came to be appointed in 1961 and the appointment of each of them had to be approved by the Public Service Commission, once the approval is granted, the same will relate back to the date of first appointment. That is the meaning of the expression in Model No. 11; or from the date of the order of the first appointment, if such appointment is followed by confirmation.' It is not disputed that all the petitioners except petitioner 4 were approved by the Public Service Commission on September 30, 1963 and yet respondent No. 7—J. S. Negi is shown at S. No. 17 while petitioner No. 1 who joined service on



March 4, 1960 and whose appointment was approved on the same day has been assigned S. No. 27 in the seniority list. If the first appointment is made by not following the prescribed procedure but later on the appointee is approved making his appointment regular it is obvious commonsense that in the absence of a contrary rule, the approval which means confirmation by the authority which had the authority power and jurisdiction to make appointment or recommend for appointment, will relate back to the date on which first appointment is made and the entire service will have to be computed in reckoning the seniority according to the length of continuous officiation. That has not been done in this case. Therefore, assuming that the model principle set out in the 1940 Order has a binding effect, the impugned seniority list does not conform to the prescribed guideline and would certainly be invalid.

14. Once it is shown that the 1940 Order did not prescribe any binding rule or seniority, but it was a model prescribed for adoption and the adoption having not been shown, it cannot prescribe a binding rule or seniority. Assuming that it is deemed to have been adopted the seniority list does not conform to the model as interpreted by us.

15. Now if there was not binding rule of seniority it is well-settled that length of continuous officiation prescribes a valid principle of seniority. The question is : from what date the

service is to be reckoned? It was urged that any appointment of a stop-gap nature or pending the selection by Public Service Commission cannot be taken into account for reckoning seniority. In other words, it was urged that to be in the cadre and to enjoy place in the seniority list, the service rendered in a substantive capacity can alone be taken into consideration. We find it difficult to accept this bald and wide submission. Each case will depend upon its facts and circumstances. If a stop-gap appointment is made and the appointee appears before the Public Service Commission when the latter proceeds to select the candidate and is selected, we see no justification for ignoring his past service. At any rate there is no justification for two persons selected in the same manner being differently treated. That becomes crystal clear from the place assigned in the seniority list to petitioner No. 1 in relation to respondent No-7. In fact if once a person appointed in a stop-gap arrangement is confirmed in his post by proper selection his past service has to be given credit and he has to be assigned seniority accordingly unless a rule to the contrary is made that has not been done in the case of all the petitioners. The error is apparent in the case of petitioner 1 and respondent No. 7. These errors can be multiplied but we consider it unnecessary to do so. In fact a fair rule of seniority should ordinarily take into account the past service if the stop-gap arrangement is followed by confirmation. This view which we are taking



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arner out by the decision of this Court in Baleshwar Dass v. State of U.P., (1981) 1 SCR 449 : (AIR 1981 SC 41), wherein this Court observed that the principle which has received the sanction of this Court's pronouncement is that officiating service in a post for all practical purposes of seniority is as good as service on a regular basis. It may be permissible, within limits for Government to ignore officiating service and count only regular service when claims of seniority come before it, provided the rules that regard are clear and categorical and do not admit of any ambiguity and a wholly arbitrary cut-off of long years of service does not take place or there is a functionally and qualitatively substantial difference in the service rendered in the two types of posts'. It was said that service rules will have to be reasonable and not grossly unjust if they are to survive the test of Articles 14 and 16. It is thus well-settled that where officiating appointment is followed by confirmation unless a contrary rule is shown, service rendered as officiating appointment cannot be ignored for reckoning length of continuous officiation in determining the place in the seniority list, admittedly, that has not been done and the seniority list is drawn from the date on which the approval/confirmation was made by the Public Service Commission in respect of each member of the service, which is clearly violative of Art. 16 and any seniority list drawn on this invalid basis must be quashed.

16. A grievance was made that the petitioner have moved this Court after a long unexplained delay and the Court should not grant any relief to them. It was pointed out that the provisional seniority list was drawn up on March 22, 1971 and the petitions have been filed in the year 1983. The respondents therefore submitted that the Court should throw out the petitions on the ground of delay, laches and acquiescence. It was said that promotions granted on the basis of impugned seniority list were not questioned by the petitioners and they have acquiesced into it. We are not disposed to accede to this request because respondents 1 to 3 have not finalised the seniority list for a period of more than 12 years and are operating the same for further promotion to the utter disadvantage of the petitioners. Petitioners went on making representations after representations which did not yield any response, reply or relief. Coupled with this is the fact that the petitioners belong to the lower echelons of service and it is not difficult to visualise that they may find it extremely difficult to rush to the Court. Therefore, the contention must be rejected.

17. In view of the discussion, these petitions succeed and are allowed and a writ in the nature of certiorari is issued quashing the impugned seniority list dated March 22, 1971 in respect of Khandsari Inspectors. The respondents 1 to 3 are directed to draw up a fresh seniority list based on the principle



of length of continuous officiation reckoned from the date of first appointment if the appointment is followed by confirmation i. e. selection/approval by the State Public Service Commission. We

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order accordingly, but in the circumstances of the case, there will be no order as to costs.

Petitions allowed



**Y. V. Chandrachud**  
**Judge**  
**Supreme Court of India**

### OBSERVATION

Constitution of India, Arts. 226, 311—Writ Petition—Laches—Works Manager of Haryana Roadways compulsily retired—Review application filed by him, rejected—Manager thereupon filing writ petition challenging his compulsory retirement as well rejection of his review application—Dismissal of writ petition on ground that remedy of review adopted by Manager was tenuous remedy, improper. W. P. No. 3944 of 1979, D/ 20-12-1979 (Punj. & Har.), Reversed.

### OBSERVED BY

Mr. Y. V. Chandrachud,  
Mr. D.P. Madon and  
Mr. Ranganath Misra  
Hon'ble Judges, Supreme Court of India

### IN

Civil Appeal No. 3417 of 1982, decided on 19-7-1984, in the case of Sikander Pal Singh, Appellant v. State of Haryana and others, Respondents.

### TEXT

Chandrachud, C.J. :—The appellant who was working as a Works Manager, Karnal Depot, Haryana Roadways was retired compulsorily by an order dated May 4, 1976. He filed a review petition to the Government of Haryana to challenge the order of compulsory retirement. That review petition was disposed of by the State Government on July 9, 1979. The appellant filed a writ petition in the High Court of Punjab and Haryana on October 23, 1979 to challenge the order of compulsory retirement and the refusal of the State Government to review that order. The writ petition was dismissed by the High Court on the ground mainly that though the order of compulsory retirement was passed in May, 1976 the appellant merely resorted to a tenuous claim for

reviewing that order instead of challenging that order on merits in a Court of law. Being aggrieved by the order of the High Court the appellant has filed this appeal by special leave.

2. We are unable to accept the view of the High Court that in seeking a review of the order by which he was retired compulsorily the appellant adopted a tenuous remedy. It is clear from the very order dated July 9, 1979 passed by the Secretary, Haryana Government Transport Department that a Review Board is constituted by the State of Haryana for reviewing orders of compulsory retirement. That order says that the case of the appellant was put up before the "Review Board" but the Board did not feel the necessity of changing the decisions



which was already taken by the Government. In these circumstances it cannot be said that the appellant had resorted to a tenuous remedy for the vindication of his rights.

3. As stated above the review order is dated July 9, 1979 while the writ petition was filed by the appellant in October 1979. Obviously the writ petition could not have been dismissed on the ground that it is suffered from laches.

4. The High Court has made a passing observation that there was no infirmity in the order of compulsory retirement but no reason at all has been given in support of that observation. It seems to us that being influenced by the consideration that the writ petition suffered from laches the High Court did not consider the merits of the matter. Since we are differing from the High Court on the question of laches and find that the writ petition did not suffer from any defect of a preliminary nature it becomes necessary to remand the matter to the High Court for re-consideration of the writ petition on merits.

5. Miss Lily Thomas who appears on

behalf of the appellant has raised two principal contentions before us. The first contention is that the order of compulsory retirement is bad because it was passed without consulting State Public Service Commission. The second contention is that the appellant could not have been retired compulsorily before he had completed 25 years of service. The High Court will examine the correctness of these and any other contentions which the appellant may legitimately raise before it.

6. It would appear that the appellant would have retired in the normal course in 1982. On that basis he would be entitled to retirement benefits under the relevant rules. Even on the basis of compulsory retirement he would we suppose be entitled to retirement benefits. If the benefit due to the appellant have not been given to him the High Court will pass an appropriate order directing the Government to give the same to him.

7. The appeal is accordingly allowed with costs which we quantify at one thousand rupees.

Appeal allowed.



## OBSERVATION

**Constitution of India, Arts. 226 and 320—Provisions of Art. 320 are directory—Person selected by public Service Commission—Has to right to appointed—No mandamus lies.**

## OBSERVED BY

Mr. D. A. Desai,  
Mr. Amrendra Nath Sen and  
Mr. R. B. Misra,  
Hon'ble Judges, Supreme Court of India.

## IN

Civil Appeal No. 1194 of 1984, decided on 28-9-1984, in the case of Jatinder Kumar and others, Appellants v. State of Punjab and others, Respondents.

## TEXT

R. B. Misra, J. :—The main question for consideration in this appeal by special leave is whether a person selected by the subordinate Service Selection Board for direct appointment to the post of Assistant Sub-Inspector of Police has got an unfettered right to be appointed on the basis of the recommendation made by the said Board.

2. The material facts to bring out the point in controversy are as follows. On 31st of March, 1978 the Inspector General of Police, Punjab, respondent No. 2, sent a requisition to the Subordinate Service Selection Board (for short, the Board), respondent No. 3 to select and recommend 7 suitable persons for the post of Assistant Sub-Inspector of Police. While the matter was pending for consideration 50 more posts of Assistant

Sub-Inspectors of Police became available and, therefore, the Board was recommended 57 suitable persons for these posts. The appellants along with many others were interviewed and physically tested on various dates ranging from 24th of October, 1978 to 6th of February, 1979. Later on after the interviews were over but before the select list could be finalised by the Board the Inspector General of Police vide his letter dated 31st of August, 1979 requested the Board to recommend 170 more persons in addition to 57 already under consideration in anticipation of further vacancies likely to occur as a result of expected reorganisation of the police Force. In that connection a proposal for the disbandment of the Punjab Armed Police Battalion and instead creation of some additional posts



for the District Police, had already been submitted. Thus, in all 227 candidates were to be recruited by the Board for the post of Assistant Sub-Inspectors of Police. The Board, however, recommended a panel of 144 candidates on 22nd of December, 1979.

3. It appears that the proposal for disbandment of the Punjab Armed Police Battalion and creation of additional posts in the districts referred to above was turned down by the Government and, therefore, the anticipated 170 temporary vacancies of Assistant Sub-Inspectors against direct recruitment quota could not be available. Out of the earlier 57 posts, however, 9 were offered to the wards of the deceased Police officers in accordance with the Punjab Government instructions regarding priority appointments issued vide letter No. 80 (GOI)-SII (3)/73/12092 dated 18th April, 1973. The remaining 48 posts were offered to the candidates recommended by the Board in order of merit determined by the Board. Since the remaining candidates recommended by the Board pursuant to the latter requisition were not appointed as there were no vacancies, the disgruntled candidates filed two petitions under Art. 226 of the Constitution before the High Court.

4. The stand of the petitioners in the two petitions was :

(a) that the vacancies had already been communicated to the Board and it was on that basis that the Board had recommended their names for appointment

and the State was bound to appoint them on the basis of the recommendation of the Board ;

(b) that the State was bound to follow the Punjab Police Rules and under rule 12.3 twenty-five per cent of the posts in the rank of Assistant Sub-Inspectors are to be filled in by direct recruitment and the remaining seventy-five per cent are to be filled by promotion;

(c) that the State adopted a device of making ad hoc appointment of the Assistant Sub-Inspectors by posting Head-Constables as Assistant Sub-Inspectors and the whole action was mala-fide as the State Government intended to select and appoint its own favourites;

(d) that the action of the Government in not appointing them pursuant to the recommendation of the Board is violative of Arts. 14 and 16 of the Constitution ;

(e) that even after the abolition of the Board the candidates recommended by it could not be refused appointment on the ground that the Board later on became functus officio ;

and

(f) that even after the expiry of six months fixed by the Government in instructions the petitioner could be appointed on the basis of recommendation of the Board.

5. The petitions were resisted by the State Government on the ground inter alia that by 7th of January, 1980 only 57 posts in the direct recruitment quota became available and appoint-



ts were made. As regards the remain-  
vacancies of 170 temporary posts of  
stant Sub-Inspectors, proposal for  
ndment of the Punjab Armed Police  
ion and instead creation of come  
tional posts for the District Police  
eventually turned down by the State  
ernment and so no additional  
ncies became available and the peti-  
ers could not be appointed. In  
case the petitioners could not claim  
intment as of right merely because  
Board had recommended their names.  
as further pleaded that according to  
Government instructions issued vide  
r No. 1673-C-II-56 dated 22nd  
ch, 1947 a time limit of six months  
been prescribed for filling up the  
ncies by persons recommended by  
Board and after the expiry of six  
ths a fresh reference had to be made  
e Board. As six months prescribed  
already expired the petitioners could  
be appointed on the basis of the  
mmendation of the Board. They also  
ed the allegation of mala fides in the  
hoc appointment of other persons  
further pleaded that the refusal of the  
ernment to appoint them was not  
by Articles 14 and 16 of the Consti-  
on.

6. On a consideration of the mate-  
on the record the record the lear-  
single Judge came to the conclusion  
there was neither any vacancy in  
quota of direct recruits of Assis-  
Sub-Inspectors nor a single post  
nt for direct recruits is manned by  
ad hoc employee, that no case of

mala fides of favoritism has been made  
out, and that there was no violation of  
Articles 14 and 16 of the Constitution.  
A letters patent appeal preferred by the  
petitioner before the High Court.

7. The petitioners before this Court  
in appeal categorically stated on oath  
that 500 promotions had been made by  
the State of Punjab and that the petiti-  
oners were entitled to 25 per cent of those  
posts according to quota rule. They also  
alleged that 250 vacancies of Assistant  
Sub-Inspectors were available in the  
C.I.D. wing alone in the Punjab Police  
and 250 persons had not promoted aga-  
inst those vacancies on ad hoc basis. This  
Court by its order dated 9th January,  
1984 directed the State to supply detailed  
information to the petitioners of the  
names and designations of the Head  
Constable promoted as Assistant Sub-  
Inspectors between the period from 1979  
to 1983. Pursuant to that order the State  
gave full details of the various promo-  
tions made in various ranges totalled 646  
and according to the State during 1979-  
1983, 576 vacancies of Assistant Sub-  
Inspectors in promotee quota became  
available on account of promotion of 576  
Assistant Sub-Inspectors to the rank of  
Offg. Sub-Inspectors, 5 against retire-  
ment of such officers, 13 due to death, 2  
due to dismissal and 4 due to reversion  
of promotee Assistant Sub-Inspectors.  
In addition, a total of 60 additional tem-  
porary posts of Assistant Sub-Inspectors  
were sanctioned by the Government  
during the period against which such  
promotions were made. Thus, out of  
the total 660 vacancies of promotee



quota during the aforesaid period 646 promotions had been made and on 31st December, 1983 there were 14 vacancies in the rank of Assistant Sub-Inspectors against promtee quota.

8. Before we deal with the points raised by Mr. Frank Anthony in support of the appellants we must record our disapproval of the inconsistent pleas taken by it at various stages. To start with, it took up the plea that there were no ad hoc appointments of Assistant Sub-Inspectors from 1979 but later on it went back upon its previous statement and admitted that there were ad hoc appointments made but explained the position by subsequent affidavits wherein it was stated that the C.I.D. has no cadre strength of its own and all the posts, except language stenographers, are filled in by taking officers on deputation from other units of the Police department and no ad hoc appointments were made in the rank of Assistant Sub-Inspectors and that the petitioners could not be appointed as no posts for the petitioners were available with the department, but it is not necessary to refer to those explanations in any detail.

9. Be that as it may, the fact remains that in anticipation of the proposal for disbandment of the Punjab Armed Police Battalion and instead creation of some additional posts for the district Police a requisition was made for selecting 170 more candidates for direct appointment to the post of Assistant Sub-Inspectors. But the proposal having

been turned down by the Government there were no vacancies and, therefore, the question arises whether the petitioners have got an unfettered right to be appointed even though the aforesaid proposal had not been accepted and consequently there were no vacancies.

10. We now take up the contentions raised by Mr. Frank Anthony's counsel for the appellants, that they have a right to be appointed to the post of Assistant Sub-Inspectors on the basis of the selection made by the Board.

11. Article 320 of the Constitution enumerates the duties to be performed by the Union or the State Public Service Commission:

(i) to conduct examinations for appointment to the services of the Union and the services of the State respectively;

(ii) if requested by any two or more States so to do, to assist those States in framing and operating schemes of joint recruitment for any services for which candidates possessing special qualifications are required;

(iii) to advise on matters enumerated under cl. (3) of Article 320; and

(iv) to advise on any matters referred to them and any other matters which the President, or as the case may be, the Governor of the State may refer to them.

The fact that there is no provision in the Constitution which makes the acceptance of the advice tendered by the



Commission, when consulted, obligatory renders the provisions of Art. 320 (3) only directory and not mandatory.

12. The establishment of an independent body like Public Service Commission is to ensure selection of best available persons for appointment in a post to avoid arbitrariness and nepotism in the matter of appointment. It is constituted by persons of high ability, varied experience and of undisputed integrity and further assisted by experts on the subject. It is true that they are appointed by Government but once they are appointed their independence is secured by various provisions of the Constitution. Whenever the Government is required to make an appointment to a high public office it is required to consult the Public Service Commission. The selection has to be made by the Commission and the Government has to fill up the posts by appointing those selected and recommended by the Commission adhering to the order of merit in the list of candidates sent by the Public Service Commission. The selection by the Commission, however, is only a recommendation of the Commission and the final authority for appointment is the Government. The Government may accept the recommendation or may decline to accept the same. But if it chooses not to accept the recommendation of the Commission the Constitution enjoins the Government to place on the table of the Legislative Assembly its reasons and report for doing so. Thus, the Government is made answerable to the House

for any departure vide Article 323 of the Constitution. This, however, does not clothe the appellants with any such right. They cannot claim as of right that the Government must accept the recommendation of the Commission. If, however, the vacancy is to be filled up, the Government has to make appointment strictly adhering to the order of merit as recommended by the Public Service Commission. It cannot disturb the order of merit according to its own sweet will except for other good reasons viz, bad conduct or character. The Government also cannot appoint a person whose name does not appear in the list. But it is open to the Government to decide how many appointments will be made. The process for selection and selection for the purpose of recruitment against anticipated vacancies does not create a right to be appointed to the post which can be enforced by a mandamus. We are supported in our view by the two earlier decisions of this Court in *A.N.D. Silva v. Union of India* 1962 Supp. (1) SCR 968 : (AIR 1962 SC 1130) and *State of Haryana v. Subash Chander Marwaha* (1974) 1 SCR 165 : (AIR 1973 SC 2216). The contention of Mr. Anthony to the contrary cannot be accepted.

13. It was next contended for the appellants that the Punjab and Haryana High Court itself had taken a different view *G. S. Kalkat v. State of Punjab* Pronounced on 15th July, 1980. from the one taken in the instant case and a copy of the judgement in that case has been filed. We have perused the judge-



ment but find that the facts of that case were materially different from the facts of the case in hand.

14. The next contention raised on behalf of the appellants was that the action of the Government in not appointing them in spite of the fact that they were selected and their names were recommended by the Board for appointment, was mala fide. The allegations about mala fides are more easily made than made out. There are no materials before us to warrant the conclusion that the action of the State Government in not appointing them was mala fide especially when the post in anticipation where of the Board was asked to select more candidates came to an end. There was no question of their appointment against those vacancies.

15. Likewise, the contention that the action of Government is hit by Arts. 14 and 16 of the Constitution has no substance. The case of the appellants is not identical with those of persons who were appointed as against 57 vacancies for which original requisition was made to the Board for selecting them.

16. An argument of desperation was further advanced about promissory estoppel stopping the State Government from acting in the manner it did it not appointing the appellants although their names had been recommended. The notification issued by the Board in this case was only an invitation to candidates possessing specified qualifications to

apply for selection for recruitment selection for recruitment for certain posts. It did not hold out any promise that the selection would be made or it was made the selected candidate would be appointed. The candidate did not acquire any right merely by applying for selection or for appointment after selection. When the proposal for disbandment of the Punjab Armoured Police Battalion and instead creation of additional posts for the district police was turned down by the State Government, the appellants were duly informed of the situation and there was no question of any promissory estoppel against the State.

17. It was further contended by Mr. Anthony that the recommendation made by the Board would remain effective even after the body had become defunct. It is not necessary to go into detail on this contention inasmuch as the fate of the case depends upon whether the appellants had a right to get appointed on the basis of the selection and recommendation made by the Board. The appellants came to Court to vindicate their right but if they had no right there was no question of enforcing that right.

18. For the foregoing discussion the appeal has no force and, therefore, it must fail. It is accordingly dismissed but in the circumstances of the case the parties should bear their own costs.

Appeal dismissed



**A. P. Sen**  
**Judge**  
**Supreme Court of India**

### OBSERVATION

**Constitution of India—Article 311 (2)—Punjab Police Rules, 1934—Volume rule 12.21—Discharge from service in innocuous form on the basis of misconduct after making enquiry behind the back of appellant without serving charge sheet, calling explanation and giving opportunity to cross examine witnesses—Order is liable to be quashed and set aside.**

### OBSERVED BY

**Mr. A. P. Sen and**  
**Mr. B. C. Ray**

**Hon'ble Judges, Supreme Court of India**

### IN

**Civil Appeal No. 2327 of 1986, decided on 8th August, in the case of Smt. Rajinder Kaur, Appellant versus Punjab State and another, Respondents.**

### TEXT

**A. P. Sen, J. :—** After hearing the learned counsel for both the parties and consideration of the question of law involved in this petition, Special Leave granted. Arguments heard.

2. The appellant petitioner was appointed as a lady constable in Hoshiarpur district on 7-5-1979. After completion of training she was posted in March, 1980 to the police lines, Hoshiarpur. The Superintendent of Police Hoshiarpur discharged the appellant from service by an order dated 9-9-1980 under Rule 12.21, Volume 7 of the Punjab Police Rules, 1934. The said order is in the following terms :

“Lady Constable Rajinder Kaur No. 2 is unlikely to prove an efficient police officer. She is, therefore, here by dis-

charged from the Police Force under P. P. 12.21 with effect from today (9-9-1980).

Issue orders in O. R. and all concerned to notice and necessary action.”

This order was made, it has been stated in the petition without serving any charge-sheet on her and without asking her to explain any charge. The order also has not recorded any reason for her discharge from service. Against this order the appellant made a representation to the Deputy Inspector General of Police, Jullunder Range. The said representation was rejected on 17-10-80. The appellant filed a revision against the order of the Deputy Inspector General of Police and the same was also dismissed on 15-4-81. The appellant there



after filed a civil suit No. 327/ASSJ/82 in the Court of Additional Senior Sub-Judge, Hoshiarpur on 16-11-1981 challenging the order of discharge as bad, arbitrary and against the principles of law. The said suit was dismissed by the Additional Senior Sub-Judge, Hoshiarpur on 28-2-1983. Thereafter the appellant filed an appeal before the District Judge, Hoshiarpur on 31-3-1983 and it was numbered as Civil Appeal No. 45 of 1983. The said appeal was dismissed on 7-5-1984 and the judgement of the Trial Court was confirmed. A Regular Second Appeal No. 2189 of 1984 was filed before the High Court of Punjab and Haryana at Chandigarh. The said Second Appeal was dismissed on 10-10-1984. Hence the instant application for grant of special leave to appeal under Article 136 of the Constitution has been filed in this Honourable Court by the appellant.

3. The main argument advanced on behalf of the appellant is that the impugned order of discharge from service was made not in accordance with Rule 12.21 of the Punjab Police Rules, 1934 in accordance with the terms and conditions of the service but it was made by way of punishment. An enquiry was made by the Deputy Police Superintendent, Garhshankar as to the character of the appellant into the allegation that she stayed at Mahalpur for 1 or 2 nights with one constable, Jaswant Singh and evidences were recorded therein without giving the appellant any opportunity of hearing in the enquiry and without giving the appellant any opportunity to cross-examine the witnesses and the impugned order

was made after the completion of the investigation on the ground of her misconduct which casted a stigma on her service career. The order in question is, therefore, not an innocuous one though expressed in innocuous terms. It is made by way of punishment, the ground being her misconduct as found on the basis of the investigation of certain allegations behind her back.

4. It was urged on behalf of the respondents that the order discharging the appellant from service was not made by way of punishment. The order was made in accordance with the terms of Rule 12.21 of the said Rules which empowers the authorities to do away with the service of the constable at any time within three years of her enrolment, if she is found unlikely to prove an efficient police officer, by the Superintendent of Police and no appeal has been provided for under the Rules against the said order of discharge. It was, therefore, urged that the order being made in accordance with the conditions of service of the appellant and so it is unchallengeable before this Court by filing a special leave petition to appeal.

5. Admittedly, the appellant was appointed as a lady constable on 7-5-1979 and she was posted in march 1980 in the Police lines, Hoshiarpur after completion of her training. It has been stated in para 15 of the petition that on an allegation made by the department against the appellant that she spent two nights with a constable an investigation was caused to be made



to the said allegation against her conduct and on the basis of that investigation the impugned order of discharge was made by the Superintendent of Police, Hoshiarpur. In Para 15 of the counter-affidavit sworn on behalf of respondent it has been stated that the Superintendent of Police, Hoshiarpur got conducted a confidential enquiry through a Deputy Superintendent of Police regarding the conduct of the appellant. On an overall assessment of the work and conduct of the appellant of the Superintendent of Police, Hoshiarpur came to the conclusion that she was not likely to become an efficient Police Officer and thus passed an order discharging her from service in accordance with the conditions of the service. These averments made in para 15 of the counter-affidavit have been verified to be true and correct to the knowledge of the deponent based on the information derived from the record of the case. Thus, it is clear from these averments that the impugned order of discharge though stated to be made in accordance with the provisions of Rule 21 of the Punjab Police Rules, 1934, was really made on the basis of the misconduct as found on enquiry into the allegation behind her back by the Deputy Superintendent of Police, Garh-Shankar. It is not disputed that the enquiry was made without serving her the charge-sheet and without giving her any opportunity to explain the charges and the allegations levelled against her. The enquiry was conducted behind her back and on the basis of the result of the investigation she was discharged from

service. Therefore in these circumstances, it does not lie in the mouth of the respondents to submit before this Court that the order is an innocuous and it an order made simply in accordance with the conditions of her service under Rule 12.21 of the said Rules. On the other hand, in the background of these facts and circumstances it is crystal clear that the impugned order of discharge from service of the appellant was made on the ground of her misconduct and it is per se in nature as it casts a stigma on the service career of the appellant.

6. The next question arises is whether the appellant who is yet to be confirmed in the service and has no right to the post in question, the impugned order can be assailed as violative of the protection given by Article 311 (2) of the Constitution. This point has been well-settled by several decisions of this Court.

7. This Court has stated in no uncertain terms in the case of *P.L. Dhingra v. Union of India* 1958 SCR p. 828 at 862, as follows :

“But even if the Govt. has, by contract or under the rules the right to terminate the employment without going through the procedure prescribed for inflicting the punishment of dismissal or removal or reduction in rank, the Government may nevertheless, choose to punish the servant and if the termination of service is sought to be founded on misconduct, negligence, inefficiency or other disqualification, then if it is a punishment and the requirements of Article



311 must be complied with.

This decision has been relied upon by this Court in the case of *K. H. Phadnis v. State of Maharashtra* 1971 SCR (Supp.) p. 118, where it has been held that even in the case of reversion of an employee who has been repatriated from the temporary post of Controller of Food, Grains Department to his parent department of Excise and Prohibition, to which he had a lien might be sent back to the substantive post in ordinary routine administration or because of exigencies of service. Such a person may have been drawing a salary more than that of his substantive post but when he is reverted to the parent department the loss of salary cannot be said to have any penal consequences. The matter has to be viewed as one of substance and all relevant factors have to be considered in ascertaining whether the order is a genuine one of accident of service in which a person sent from the substantive post to a temporary post has to go back to the parent post without any aspersion against his character or integrity, or whether the order amounts to a reduction in rank by way of punishment.

8. It has been further observed by this Court in the case of *State of Bihar & Ors. v. Shiva Bhikshuk Misra*. 1971 (2) SCR 191 at 196.

“The form of the order is not conclusive of its true nature and it might merely be a cloak and camouflage for an order founded on misconduct, it May

be that an order which is innocuous on the face and does not contain any imputation of misconduct is a circumstance or a piece of evidence for finding whether it was made by way of punishment or administrative routine. But the entirety of circumstances preceding or attendant on the impugned order must be examined and the overriding test will always be whether the misconduct is a mere motive or is the very foundation of the order,...

In the case of *Shamsher Singh and anr. v. State of Punjab*, 1975 (1) SCR p. 874 at 837, it has been observed as under:

“No abstract proposition can be laid down that where the services of a probationer are terminated without saying anything more in the order of termination than that the services are terminated it can never amount to a punishment in the facts and circumstances of the case. If a probationer is discharged on the ground of misconduct or inefficiency or for similar reason without a proper enquiry and without his getting a reasonable opportunity of showing cause against his discharge it may in a given case amount to removal from service within the meaning of Article 311 (2) of the Constitution.”

It has been observed this Court in the case of *Anoop Jaiswal v. Government of India & Anr.* 1984 (2) SCR 453 as under.

“When the form of the order is merely a camouflage for an order



**A. P. Sen****Judge****Supreme Court of India**

dismissal for misconduct it is always open to the Court before which the order is challenged to go behind the form and ascertain the true character of the order. If the Court holds that the order though in the form is merely a determination of employment is in reality a cloak for an order of punishment, the Court should not be debarred, merely because of the form of the order, in giving effect to the rights conferred by law on the employee".

On a conspectus of all these decisions mentioned hereinbefore, the irresistible conclusion follows that the impugned order of discharge though couched in innocuous terms, is merely a camouflage for an order of dismissal from service on the ground of misconduct. This order has been made without serving the appellant any charge-sheet, without asking for any explanation from her and without giving any opportunity to show cause

against the purported order of dismissal from service and without giving any opportunity to cross-examine the witnesses examined, that is, in other words the order has been made in total contravention of the provisions of Article 311 (2) of the Constitution. The impugned order is, therefore, liable to be quashed and set aside. A writ of certiorari be issued on the respondents to quash and set aside the impugned order dated 9-9-1980 of her dismissal from service. A writ in the nature of mandamus and appropriate directions be issued to allow the appellant to be reinstated in the post from which she has been discharged. The appeal is thus allowed with costs. The authorities concerned will pay all her emoluments to which she is entitled to in accordance with the extant rules as early as possible in any case not later than eight weeks from the date of this judgement.



**IT IS THE ESSENCE OF DEMOCRACY  
TO OBEY  
NO MASTER BUT THE LAW**



A.P. Sen

Judge

Supreme Court of India

### OBSERVATION

(i) Punjab Service of Engineers, Class II P.W.D. (Irrigation Branch Rules, 1964—Rule 2(12)—Member of Service—Appointment as Temporary Engineer purely on ad hoc basis defying the rules—Whether service rendered as such should be counted towards eligibility of 8 years service for promotion in next higher grade...(No)

(ii) Haryana Service of Engineers, Class I, P.W.D. (Irrigation Branch Rules, 1964 (As amended in 1975)—Order of promotion to the post of Executive Engineer purely on ad hoc basis for six months expressly stating interim subject to the rights of other officers—Quashed by High Court—Validity—High Court wrong in quashing the same.

### OBSERVED BY

Mr. A. P. Sen and  
Mr. S. Natarajan

Hon'ble Judges, Supreme Court of India

### IN

Civil Appeal No. 149 of 1981 decided on 17-12-1986, in the case of Ashok Gulati & others, Appellants v. B. S. Jain & others, Respondents.

### TEXT

A. P. Sen, J.—In this appeal by special leave, the short question involved is whether respondents Nos. 1 and 2 were entitled to the benefit of the period of service rendered by them as Temporary Engineers on an ad hoc basis in the Irrigation Branch of the Public Works Department, State of Haryana i. e. prior to their appointment as Assistant Engineers on regular basis on April 21, 1975 along with the six appellants and respondents Nos 5-24 for purposes of reckoning their eligibility for promotion to the Post of Executive Engineer under r. 2(b) read with the Explanation thereof of the Haryana Service of Engineers,

Class 1, Public Works Department (Irrigation Branch) Rules 1964, as amended in 1975, (Class I Rules' for short) as also for purposes of their seniority in the cadre of Assistant Engineers.

2. Facts bearing on the question are as follows. In response to an advertisement published in the Daily Tribune of February 6, 1970 inviting applications for appointment as Temporary Engineers on an ad hoc basis, respondent No. 1 B. S. Jain was appointed as a Temporary Engineer (ad hoc) w. e. f. January 2, 1971 for a period of six months i. e. after the coming into force



of the Haryana Service of Engineers, Class II, Public Works Department (Irrigation Branch) Rules, 1970 (Class II Rules' for short) Prior to this, respondent No. 2 S.L. Gupta was also appointed as a Temporary Engineer on an ad hoc basis w.e.f. May 19, 1969 by calling his name through the Employment Exchange i.e. subsequent to the coming in to force of the Class II Rules. Their appointments were dehors the rules to meet the exigencies of service. In the letters of appointment issued to them, it was specified that their appointment was purely on an ad hoc basis for a period of six months from the date of their joining the post on a fixed salary of Rs. 400 plus allowances and their services were terminable without notice. They were specifically informed that the appointment would not entitle them to any seniority or other benefit under the service rules for the time being in force and would also not count towards increment in their salary. They were also intimated that posts of Temporary Engineers in Class II service would be advertised in due course by the Haryana Public Service Commission and they should apply for such posts through the Commission, and that if they were not selected by the Commission, their services would be liable to be terminated without notice. Also that their inter se seniority among the Temporary Engineers would be in the order of merit in the list of candidates as settled by the Commission. The services of respondents Nos. 1 and 2 were however continued by the State Government

from time to time, six months at a time till the Secretary, Haryana, Public Service Commission by his letter dated July 8, 1973 addressed to the Commissioner and Secretary to the State Government of Haryana, Public Works Department (Irrigation Branch) conveyed the approval of the Commission to the ad hoc appointment of 251 Temporary Engineers beyond the period of six months till regular appointment were made to the posts through the Commission. Accordingly, both these respondents continued to hold the posts of Temporary Engineers on ad hoc basis till the end of the year 1974 i. e. till they were recruited as Assistant Engineers through the Public Service Commission on April 21, 1975 on regular basis.

3. It appears that in response to an advertisement issued by the public Service Commission in October 1973 respondents Nos. 1 & 2 appeared at a competitive examination along with the appellants and respondents Nos. 5-2 and were selected by the public Service Commission for appointment as Assistant Engineers under the Haryana Service of Engineers, Class II, public Works Department (Irrigation Branch) Rules, 1970. In the letter of appointment issued by the Commissioner and Secretary to Government of Haryana (Irrigation & Power Department) dated January 13, 1975 it was specified that inter se seniority of Assistant Engineers would be determined on the basis of the combined merit list prepared by the public Service Commission. In the combined merit list prepared by the Commission,



**A. P. Sen****Judge****Supreme Court of India**

respondents Nos. 1 and 2 were placed very much below the appellants and respondents Nos. 5-24 being at serial Nos. 148 and 150 respectively. It may be stated that the merit list prepared by the Commission has never been questioned before us.

4. A few more facts. The State Government of Haryana by order dated December 20, 1978 promoted 62 Assistant Engineers including the appellants and respondents Nos. 5-24 as Executive Engineers on a purely ad hoc basis for a period of six months subject to certain terms and conditions, namely : (i) The promotions were subject to the approval of the Public Service Commission as to the claims of other officers. (ii) Such promotions were not to give any right to the officers for being appointed on a substantive basis as Executive Engineers. And (iii) Such of the officers as had not passed the departmental professional and revenue examinations were required to pass Such examinations within a period of one year or otherwise they were liable to be reverted to their original post. These ad hoc promotions of the appellants and respondents Nos. 5-24 were made in relaxation of the provisions contained in rr. 6 (b) and 15 of the Haryana Service of Engineers, Class 1, Public Works Department (Irrigation Branch) Rules, 1964. Presumably, the State Government excluded from consideration the case of respondents Nos. 1 and 2 for promotion because in the combined seniority list they ranked below the appellants Nos. 5-24 being placed at serial Nos. 148 and 150 respectively.

5. The ad hoc promotion of appellants and respondents Nos. 5-24 was assailed by respondents Nos. 1 and 2 by a petition under Art. 226 of the Constitution filed before the Punjab and Haryana High Court mainly on the ground that when qualified persons like them i.e. respondents Nos. 1 and 2 were eligible for being considered for promotion to the post of Executive Engineers r. 6 (b), there was no justification whatever for the State Government to grant general relaxation under the proviso thereof to make them ineligible for persons eligible for promotion in denial of their claims. It was further pleaded that the State Government having relaxed the condition of eligibility under the proviso to r. 6 (b) read with the Explanation thereof as regards eight years service in the case of promotion of the appellants and respondents Nos. 5-24 as Executive Engineer on an ad hoc basis, failed to appreciate that respondents Nos. 1 and 2 who were recruited along with them and had also put in more or less  $3\frac{1}{2}$  years service as Assistant Engineers became entitled to the benefit of such relaxation and the action of the State Government is not considering their cases for such promotion was wholly arbitrary and was tantamount to denial of equal opportunity in the matter of employment in violation of Arts. 14 and 16(1) of the Constitution. It was also pleaded that the power conferred on the State Government to grant relaxation under r. 22 was not a general power but a power to mitigate hardship in a particular case and thus the general



relaxation granted by the State Government to some of the respondents who had not passed their departmental, professional and revenue examinations was invalid. It was asserted that the State Government and Engineer-in-Chief, Irrigation Department, Haryana had wrongly treated respondents Nos. 1 and 2 as ineligible for promotion on the ground that the period from January 1971 and May, 1969 upto April 21, 1975 i. e. the period during which respondents Nos. 1 and 2 remained employed as Temporary Engineers on ad hoc basis, could not be treated as period in that class of service within the meaning of r. 6 (b) i. e. in Class II service.

6 The specific stand taken by the State Government in the return filed before the High Court was that respondents Nos. 1 and 2 were recruited to the post of Assistant Engineer on April 21, 1975 and thus had only about  $3\frac{1}{2}$  years service on December 20, 1978 to their credit when appellants and respondents Nos. 5-24 were promoted as Executive Engineers on an ad hoc basis. Prior to their appointment as Assistant Engineers, respondents Nos. 1 and 2 had been appointed as Temporary Engineers on ad hoc basis behors the rules and under the terms of appointment they were not entitled to any seniority or other benefit under the service rules as a result of such appointment. Further it was pleaded that respondents Nos. 1 and 2, in the seniority list prepared by the Public Service Commission were ranked junior to the appellants and respondents Nos. 5-24

and therefore they were not entitled to be considered for promotion.

7. A learned Single Judge (R.N. Mittal, J) by his judgement dated October 8, 1980 quashed the impugned order of the State Government making ad hoc promotions of the appellants and respondents Nos. 5-24 and directed the State Government to reach a decision afresh as regards the ad hoc promotions with advertence to the observations made by him. In his judgement the learned Single Judge repelled the contention of respondents Nos. 5-24 for being considered for promotion since none of them had completed eight years' service as Assistant Engineer on the ground that the State Government was empowered in terms proviso to r. 6 (b) to relax generally, in public interest the conditions regarding eight years' experience for reasons to be recorded in writing. He found on perusal of the records placed before him that reasons for the relaxation in public interest of the condition of eight years service imposed by rules 6 (b) had in fact been recorded for reducing the period  $3\frac{1}{2}$  years in consultation with the Finance Department. He accordingly held that the ad hoc promotion of the appellant and respondents Nos. 5-24 was not invalid on that account. The learned Single Judge however accepted the contention of respondents Nos. 1 and 2 that they were entitled to the benefit of the period of continuous officiation as Temporary Engineers on ad hoc basis from January 1971 and May 1969 to April 21, 1975 in reckoning eight



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**Judge**  
**Supreme Court of India**

years experience in that class of service within the meaning of r. 6 (b) i. e. Class service by reason of Explanation to 6 (b) and were therefore eligible for promotion to the post of Executive Engineer under r. 8 (2) in view of the definition of the expression 'Temporary Engineer' contained in rule 5; as amended in 1975. He also held their contention that the power conferred on the State Government under r. 22 was not a general power of relaxation but a power exercisable only to mitigate any undue hardship in the case of a particular individual and therefore the impugned order of the State Government permitting relaxations in the case of respondents Nos. 9, 10 and 11 (An Singh, P. D. Kadian and C. P. Patel) as regards the passing of the departmental professional and revenue examinations as required by r. 15 was valid. Upon that view, the learned Single Judge allowed the Writ Petition and quashed the impugned order of the State Government for the ad hoc promotion of the appellants and respondents Nos. 5-24 as Executive Engineers. Incidentally, the judgement of the learned Single Judge leaves untouched the impugned order insofar as it relates to the ad hoc promotion of 37 Assistant Engineers to the post of Executive Engineer.

8. Thereupon, the appellants preferred an appeal under clause 10 the Charter Patent but the appeal was dismissed in limine by a Division Bench (P.C. J. and C. S. Tiwana, JJ) by its order dated November 6, 1980. The learned

Judges stated that they were in full agreement with the view expressed by the learned Single Judge. The appellants apparently advanced a contention that the appointment of respondents Nos. 1 and 2 as Temporary Engineers on an ad hoc basis was contrary to para 8312 of the manual of Administration and therefore the period during which they worked as Temporary Engineers (ad hoc) could not be taken into consideration. The learned Judges repelled the contention on the ground that no such point was taken before the learned Single Judge.

9. We must at the very outset observe that the judgement of the learned Single Judge quashing the impugned order of the State Government for the promotion of the appellants and respondents Nos. 5-24 as Executive Engineers on an ad hoc basis on the ground that State Government could not have relaxed the condition of passing the departmental professional and revenue examinations prescribed under rule 15 of the Class I Rules by taking recourse to rule 22 which did not confer a general power of relaxation can hardly be sustained. We are afraid, the learned Single Judge was completely misled in taking the view that he did. This was not a case of relaxation at all but a question of prescribing the period during which such examinations had to be cleared as required under rule 15. Rule 15 in terms provides that the departmental professional and revenue examinations for purposes of promotion to the Class I service have to be passed



within such period as may be prescribed. The word 'prescribed' in rule 15 clearly empowers the State Government to provide for the period during which the promoted officers had to pass the departmental test. In terms of that rule, the State Government by the impugned order directed that the officers who had not passed the departmental professional and revenue examinations were required to pass such examinations within a period of one year otherwise they were liable to be reverted to their original post. It must be said in all fairness that learned counsel for respondents Nos. 1 and 2 did not support this part of the judgement.

10. After having heard learned counsel for the parties quite at some length in a hearing lasting over several days, we feel that irrespective of the merits of the contentions advanced, no useful purpose would be served in maintaining the judgement of the High Court insofar as it quashes the impugned order of the State Government dated December 20, 1978 for the promotion of the appellants and respondents Nos. 5-24 as Executive Engineers on ad hoc basis after a lapse of such a long time as it would create unnecessary administrative complications. During the hearing we expressed our doubts about the wisdom of the High Court in entertaining the Writ Petition of respondents Nos. 1 and 2 particularly when the impugned order of the State Government making promotion of the 62 Assistant Engineers including the appellants and respondents Nos. 5-24 as Executive Engineers was

purely on an ad hoc basis for a period of six months and expressly made subject to the rights of other officers. Instead of interfering with the impugned order of the State Government the proper course for the High Court should have been to issue a direction to the State Government to consider the cases of the eligible officers including respondents Nos. 1 and 2 for ad hoc promotion as Executive Engineers if their turn was due for such promotion according to their placement in the seniority list and it should have in the meanwhile allowed the appellants and respondents Nos. 5-24 to continue in their posts as Executive Engineers (ad hoc) subject to the condition that while considering their cases for promotion the State Government would not take that circumstance into consideration that they had continued to function as Executive Engineers on an ad hoc basis.

11. That course commends to us for another reason as well. Although the High Court by its judgement and order dated October 8, 1980 quashed the impugned order of the State Government dated December 20, 1978 making the ad hoc promotions and issued a direction that the Government should reach a decision afresh in the matter, the fact remains that neither the judgement of the High Court nor the directions made by it have taken effect. On the contrary, this Court while granting special leave on January 14, 1981 stayed the operation of the judgement of the High Court. As a consequence the result has been that the appellants and respondents Nos. 5-24 have continued



unction as Executive Engineers on ad hoc basis for the last about eight years under the interim order of stay. Incidentally, the judgement of the High Court leaves untouched the promotion of 7 Assistant Engineers and Executive Engineers. The State Government will have to give effect to the decision of the Court in A. S. Parmar v. State of Haryana laying down that a degree in Engineering was not an essential qualification for promotion of Assistant Engineers in the Irrigation Branch to the rank of Executive Engineers in Class I service under rule 6 (b) of the Class I Rules and therefore the Assistant Engineers who are diploma holders are equally eligible for such promotion. The Government in the Public Works Department (Irrigation Branch) by a notification dated June 22, 1984 purports to effect an amendment to rule 6 (b) of the Class I Rules with a view to nullify this decision of this Court in A. S. Parmar's case. By a separate judgement on the connected Writ Petitions Nos. 32/84 delivered today, we have struck down the impugned notification as violating Articles 14 and 16 (b) of the Constitution and also as ultra vires of the State Government by reason of proviso to section 82 (6) of the Punjab Reorganisation Act, 1966. It appears that the State Government has been treating a degree in Engineering referred to in Class (b) of rule 6 as an essential qualification for promotion to the post of Executive Engineer in Class I service in the case of officers in Class II service presumably on the view expressed by

the Punjab and Haryana High Court in O. P. Bhatia v. State of Haryana 1980 SLJ 126. The controversy was settled by the decision of this Court in A. S. Parmar's case and it overruled the decision of the High Court in O. P. Bhatia's case and held on a consideration of the relevant rules that the qualification of degree in Engineering was not necessary in the case of officers in Class II service for promotion to the post of Executive Engineer. That apart, we must deal with the appeal on merit as the judgement of the High Court leaves much to be desired.

12. Issues raised in this appeal by special leave are of far-reaching significance to the civil services. It involves a claim by person who had been in employment in the Government service on a purely ad hoc basis dehors the rules, that they were entitled upon their absorptions to the post on a regular basis, to the benefit of the period of their continuous officiation as temporary employees on ad hoc basis for determining their eligibility for promotion to the higher grade or post. The questions presented are whether the principles laid down in N. K. Chauhan and Others v. State of Gujarat and Others 1977 SLJ 110, and S. B. Patwardhen and Others v. State of Maharashtra and Others, 1979 SLK 421 reiterated in Baleshwar Dass and Others v. State of Uttar Pradesh; and Others 1981 (1) SLJ 223, and subsequently followed in several decisions, that ordinarily in the absence of any specific rule of seniority governing the cadre or service, the length of conti-



uous officiation should be counted in reckoning seniority as between direct recruits and promotees, should also be extended in determining seniority of such ad hoc employees vis-a-vis direct recruits, and whether the failure on the part of the Government to count the entire period of officiation as such ad hoc employees would be per se arbitrary and irrational and thus violative of Articles 14 and 16 (1) of the Constitution inasmuch as the temporary service in the post in questions was not for a short period intended to meet some emergent or unforeseen circumstances, but to meet the exigencies of the service. It is asserted that the recent pronouncement of this Court in the case of *Narendra Chadha and Others. v. Union of India and Others* (1986) 2 SCC 157, supports this view. This argument at first blush appears to be plausible but on deeper consideration is not worthy of acceptance. We proceed to give reasons therefor.

13. We are not aware of any principle or rule which lays down that the length of continuous officiation/service is the only relevant criterion in determining seniority in a particular cadre or grade, irrespective of any specific rule of seniority to the contrary. It is necessary to emphasise that the principles laid down in the two leading case of *N. K. Chauhan* and *S. B. Patwardhan*, reiterated in *Baleshwar Dass'* case and subsequently followed in several decisions are not an authority for any such proposition. These decisions particularly that in *Baleshwar Dass'* case lay down that

ordinarily and in the absence of any specific rule of seniority governing the cadre of service, the length of continuous officiation should be counted in reckoning seniority as between direct recruits and promotees. These authorities nowhere lay down that the same principle i. e. the length of continuous officiation must be the sole guiding factor and the only criterion in determining seniority of such ad hoc employees vis-a-vis direct recruits.

14. The contention on behalf of the appellants firstly is that the High Court was clearly in error in holding that the entire period of service of respondents Nos. 1 and 2 as Temporary Engineers on ad hoc basis i.e. the period from January 1971 and May 1969 to April 21 1975 had be counted not only for purposes of their seniority under rule 8(2) of the Class I Rules but also for the purposes of their eligibility for promotion to the post of Executive Engineers under rule (b). It is said that the High Court failed to appreciate that respondents Nos. 1 and 2 were not recruited as Temporary Engineers under the instructions contained in the Manual of Administration issued under the Punjab Service of Engineers Class II, public Works Department (Irrigation Branch) Rules, 1941 or under the Punjab Service of Engineers, Class II, public Wores Department (Irrigation Branch) Rules, 1970, but their appointment as Temporary Engineers was purely on an ad hoc basis de hors the rules and therefore they did not fall within the ambit of the definition of the expression 'Class



Service' as defined in rule 2 (5), as amended in 1975. Secondly, the High Court failed to take into account the fact that respondents Nos. 1 and 2 became members of Class II service only on April 21, 1975 when they were recruited as Assistant Engineers on a regular basis through the public Service Commission. Till then they did not answer the description of 'Temporary Engineers, as defined in rules 2 (5). They did not even figure in the notification dated May 18, 1982 issued by the State Government under rule 3 constituting the service of Engineers as Class II service w.e.f. December 25, 1970. It must therefore logically follow that the service rendered by them as Temporary Engineers on ad hoc basis prior to their recruitment as Assistant Engineers in 1975 could not be treated to be service in that class within the meaning of rule 6 (b) of the Class I Rules. Likewise, rule 2 (2) which speaks of any service rendered as Temporary Engineer must be construed accordingly as meaning service rendered by a Temporary Engineer recruited in the manner provided by the instructions contained in Manual Administration issued under the 1941 Rules or recruited as such under the 1970 Rules. Lastly, the decision in Baleshwar Dass' case does not lay down any proposition that persons employed on a purely ad hoc or fortuitous basis like respondents Nos. 1 and 2 are entitled as a matter of law to the benefit of their period of ad hoc service and the two later decisions in G. P. Bhalwal and Others v. The Chief Secre-

tary, Government of Uttar Pradesh and Other 1984 (2) SLJ 166, and Narendra Chadha are of little assistance. These submissions, in our opinion, must prevail.

15. In reply, the main contention of learned counsel for respondents Nos. 1 and 2 is that respondents Nos. 1 and 2 upon their absorption to the post of Assistant Engineer on a regular basis on April 21, 1975 were entitled to the benefit of the entire period of officiation as Temporary Engineers on an ad hoc basis i. e. the period from January, 1971 and May, 1969 to April 21, 1975 and the failure of the Government to count such period of their ad hoc service was per se arbitrary, irrational and thus violative of Articles 14 and 16 (1) of the Constitution inasmuch as the service rendered by them as Temporary Engineers (ad hoc) was not for a short period intended to meet some emergent or unforeseen circumstances, but to meet the exigencies of the service and there is no reason why the principle laid down in Baleshwar Dass' case should also not be extended in determining the seniority of such ad hoc employees vis-a-vis direct recruits. Secondly, he contends that exercise of the power of relaxation of the condition of eight years' service for purposes of eligibility conferred on the State Government under the proviso to rule 6 (b) is conditioned by the obligation to record reasons in writing which requirement was mandatory. There was failure on the part of the Government to record reasons therefore or to indicate any basis



to show that such relaxation was in public interest. Further, the words 'Class II Service' in rule 8 (2) must bear the same meaning as the expression 'Class II Service' as defined in rule 2 (5). The artificial definition of 'Class II Service' introduced by amendment of rule 2 (5) in 1975 was obviously to bring persons who were not Assistant Engineers i. e. members of Class II service within the zone of consideration for purposes of promotion to the post of Executive Engineer under rule 6 (b) of Class I Rules. Furthermore, the State Government having relaxed the condition of 8 years' service by recourse to the proviso to rule 6 (b) respondents Nos. 1 and 2 were similarly situated as appellants and respondents Nos. 5-24 as they were all recruited together as Assistant Engineers in Class II service in 1975 and they had all rendered about 3½ years' service in that class and therefore failure on the part of the State Government to consider the case of respondents Nos. 1 and 2 for purposes of promotion to the post of Executive Engineer was tantamount to the total exclusion of a class within a class and was thus per se discriminatory. Lastly, the action of the State Government in making ad hoc promotion of appellants and respondents Nos. 5-24 was wholly mala fide. Learned counsel wanted us to draw an inference of mala fide from the fact that the Private Secretary to Chief Minister was present at a meeting held in the room of the Irrigation Minister where the list of promotion was settled. It is suggested that initially the names of respondents No. 1

and 2 figured in the list but later on wholly extraneous considerations their names were deleted.

16. It would be convenient at this stage to refer to the relevant provision of the Punjab Service of Engineers Class I, P.W.D. (Irrigation Branch) Rules, 1964 as amended in 1975. The amendment effected in 1975 substituted a new rule 2 (5) for the existing rule 2(5) and it defined the expression 'Class II Service' as follows :

"2 (5). 'Class II Service' shall for the purpose of promotion to the service, comprise of members of the Haryana Service of Engineers, Class II (Irrigation Branch) Temporary Engineers Officiating Sub-Divisional Officers and Officiating Assistant Design Engineers, except those promoted in excess of the quota fixed under rule 6 of the Haryana Service of Engineers Class II, Public Works Department (Irrigation Branch) Rules, 1970."

The qualifications of persons eligible for appointment are prescribed in rule 6 which is in these terms:

"6. Qualifications : No person shall be appointed to the service unless he—

(a) Possesses one of the University Degrees or other qualifications prescribed in Appendix B of these Rules.

Provided that Government may waive this qualification in the



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case of a particular officer belonging to Class II Service;

- (b) In case of an appointment by promotion from Class II Service, has completed in that class of service for a period of ten years from the commencement of these rules, six years service and after that period eight years service;

Provided that if it appears to be necessary to promote an officers in the public interest, the Government may, for reasons to be recorded in writing either generally or in any individual case reduce the period of six or eight years in such extent as it may deem proper in consultation with the Finance Department.

Explanation:—For the purpose of this clause in computing of the period of six or eight years any service rendered as a Temporary Engineer shall be taken into account.”

We may next set out rule 8 which deals with the method of promotion;

“8. Appointment by promotion :

- (1) A Committee consisting of the Chairman of the Public Service Commission and where the Chairman is unable to attend any other member of the Commission representing it, the Secretary, P.W.D. (Irrigation Branch,) and the Chief Engineer, Punjab, P.W.D. (Irrigation Branch, shall be constituted.

(2) The Government shall prepare a list of eligible and suitable persons for promotions in order of their seniority in Class II Service, which shall be reckoned:

(a) in the case of a member of the Haryana Service of date of Engineers, Class II (Irrigation Branch) from the date of his continuous officiation as Sub-Divisional Officer or Assistant Design Engineer or appointment as Temporary Engineer, as the case may be :

(b) in the case of a Temporary Engineer from the date of his appointment as such.”

17. As a matter of construction, the words ‘Class II service’ in rule 8 (2) introduced by amendment in 1975 must be construed to have the same meaning as the expression ‘Class II service’ as defined in rule 2 (5). We find the language employed by the framers of the rules in the definition clause in rule 2(5) has been departed from in the definition of the expression ‘Class II service’ and it is generally but not always a fair presumption that the alteration in the language used in the new definition in rule 2(5) was intentional. Prior to the amendment in 1975, the expression, ‘Class II Service’ as defined in rule 2 (5) meant the members of Class II service including Temporary Engineers. As the State



stood in need of many more Executive Engineers it became essential to take steps to recruit not only persons who strictly belong to Class II Service proper but also to bring within the zone of consideration others who are not members of Class II Service e. g. Offg. Sub-Divisional Officers and Offg. Assistant Design Engineers who would not be so included. The key to the interpretation of the definition clause in rule 2 (5) is the words "for the purpose of promotion". The effect of the enlarged definition of Class II Service in rule 2(5) is that that these words when found in the Act must, for the purpose of promotion, be understood in that context in a certain sense i. e. to include not only members Class II Service including Temporary Engineers but also Offg. Sub-Division Officers and Offg. Assistant Design Engineers who, but for the interpretation clause, would not be so included. That would be in consonance with the purpose and object of the amendment. There is reason why the words 'Class II Service' in rule 8 (2) introduced in 1975 must bear same meaning as the expression 'Class II Service' as defined in rule 2(5) as both the provisions deal with the same subject i. e. promotion of members of Class II Service to the post of Executive Engineer in Class I Service. The mode of promotion to the post of Executive Engineer is as laid down in rule 8 (2), Now, rule 8 (1) remains unaltered. Rule 8(1) directs that a committee consisting of the Chairman of the Public Service Commission or where the Chairman is unable to attend any other mem-

ber of the Commission representing the Secretary to the Government, P.W.D. (Irrigation Branch), and the Chief Engineer, Punjab, Irrigation Branch shall be constituted. Under rule 8 (2) introduced in 1975, the Government has to prepare a list of eligible and suitable persons for promotion in order of their seniority in Class II Service which shall be reckoned (a) in the case of a member of the Haryana Service of Engineers, Class II, Irrigation Branch, from the date of his continuous officiation as Sub-Divisional Officer or Assistant Design Engineer or appointment as Temporary Engineer, as the case may be. (b) In the case of Temporary Engineer from the date of his appointment as such. These provisions can lead to no other conclusion but that the list of eligible and suitable persons for promotion has to be drawn not only comprising of regular members of Class II Service including Temporary Engineers in order of their seniority but also of Offg. Sub-Divisional Officers or Offg. Assistant Design Engineers in that class of service from the date specified therein. Apparently, the requirements of rule 8 (1) and 8 (2) have not been complied with. All that exists is the combined seniority list of Assistant Engineers belonging to Class II Service in order of their seniority prepared by the Public Service Commission which incidentally has never been challenged.

18. The meaning of the word 'as' in the collocation of the words, any service rendered as a Temporary Engineer' in Explanation to rule 6 (b) of the



Class I Rules must obviously mean 'in the capacity of'. In *Dr. Asim Kumar Bose v. Union of India and others* 1983 (1) SLJ 203, the question was whether the appellant who was a Radiologist in the Maulana Azad Medical College which has a post belonging to Specialist Grade II could be appointed to the post of Professor of Radio-Therapy in that college by direct recruitment under rule (2) of the Central Health Service (Amendment) Rules, 1966. In 1971 there were certain amendments in the Rules describing the made in which the posts of Professor and Associate Professor could be filled in and paragraphs 2 (b) and 3 of Annexure I to the Second Schedule and sub-rule (2a) to rule 8 were inserted which brought about a change. These amendments brought about a change inasmuch as they provided for a vertical channel of promotion to the teaching post upto the post of Associate professor. At page 363 of the Report this court referred to the report of the Third Pay Commission where it was observed on page 173 :

"While the Specialists on the teaching side can hold posts of hospital specialists, the latter cannot be promoted to teaching posts because of lack of teaching experience."

Presumably, the Ministry of Health on that view held that the word 'as' in paragraphs 2(b) and 3 of Annexure I to the Second Schedule and sub-rule (2a) of rule 8 makes holding of a post in the grade a condition precedent to the post of a Professor or an Associate Profe-

ssor. In that context, it was observed :  
"Normally, a Professor or an Additional Professor in a medical college or a teaching institution can be appointed by direct recruitment from amongst persons holding the post of Associate Professor or Assistant Professor in the concerned speciality in a medical college or a teaching institution having at least six years' teaching experience out of 12 years' standing the Grade through the Union Public Service Commission. Associate Professor in the medical college or a teaching institution can only be promoted from amongst persons holding the post of Reader or Assistant Professor having at least five years' teaching experience in the concerned speciality by the Department Promotion Committee. We are inclined to the view that the word "as" in the collocation of the words used "at least six years' experience as Associate Professor/Assistant Professor/Reader" in paragraph 2(b) and the words "at least five years' experience as Reader/Assistant Professor" in paragraph 3 and sub-rule (2-A) of Rule 8 must be interpreted in its ordinary sense as meaning teaching experience gained "in the capacity of". In Black's Law Dictionary, 5th Edition, page 104, the



meaning of the word "as" as given is : "Used as an adverb, etc., means like, similar to, of the same kind, in the same manner in which." In Shorter Oxford Dictionary, 3rd Edition, page 111, the word "as" is stated to mean : The same as, in the character, capacity, role of" "

In spite of all this, the contention of respondents Nos. 1 and 2 that they were entitled to the benefit of period of service rendered by them as Temporary Engineer on an ad hoc basis w.e.f. January 2, 1971 and May 19, 1969 respectively prior to their appointment as Assistant Engineers on regular basis on April 21, 1975 for purposes of reckoning their eligibility under rule 6 (b) read with the Explanation thereto of the class I Rules as also for purpose of their seniority in the cadre of Assistant Engineers, cannot prevail. They were not recruited under paragraphs 8 312 to 1. 316 of the Manual of Administration, public Works Department. In the erstwhile State of Punjab there was a distinct class of Engineers designated as Temporary Engineers. All persons to appointed as Temporary Engineers had face the Public Service Commission for selection for to the post under rule 4 and 5 the Punjab Service of Engineers, Class II, P. W. D. (Irrigation Branch) Rules, 1941. Under the Rules, the term 'Temporary Engineer' was defined in rule 2 (f) to mean engineer in the service of the Public Works Department, Punjab whose appointment was temporary witsin the meaning of the Fundamental Rules,

was pensionable and who was not a member of any regular service. The word 'service' as defined rule 2 (g) of the Rules meant the Punjab Service of Engineer, Class II, Irrigation Branch, Rule 5 provided that no Temporary Engineer could be taken into service or member of the Overseers Engineering Service, Punjab promoted unless he had been declared by the Commission on the report of the Chief Engineer to be fit for the service, was serving the Department and held an appointment for not less than two years continuously before the date of entry into the service.

19. Next came the Punjab Service of Engineers, Class II, P. W. D. (Irrigation Branch) Rules, 1970. The expression 'member of service' was defined in rule 2 (12) to mean an officer appointed substantively to a cadre post. The definitions of the word 'service' and of the term 'Temporary Engineer' in rule 2 (15) and (16) remained the same except for the difference that the word 'temporary' carried the meaning as given in the Civil Service Regulations in place of the Fundamental Rules Rule 6 provided for the manner of recruitment of Temporary Engineers from different sources, in the proportions and the order indicated. Sub-rule (3) thereof provided that in case candidate was not available from sources 1 and 3 i. e. by direct recruitment or by promotion, and a person had to be appointed in public interest, as stop-gap arrangement, the period of service rendered by such person shall not be reckoned for the purpose of seniority. Sub-rule (4) provided that



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Government could fill a short term vacancy in the exigencies of public service, after recording specific reasons, for the period not exceeding six months in the Overseers Engineering Service, Regulation Branch. It is quite apparent under these rules that appointment of respondents Nos. 1 and 2 as Temporary Engineers on an ad hoc basis was debarred by the rules.

20. It may seem to be some illogicality that though respondents Nos. 1 and 2 were appointed as Temporary Engineers on ad hoc basis, they should not be deprived of the period of their officiating as such till they were absorbed in the post of Assistant Engineer on regular basis through the Public Service Commission on April, 1975. That would be a legal consequence which cannot be avoided on well settled principles. In their case the length of continuous officiating cannot be the basis for reckoning

their seniority since they never became members of Class II Service prior to their absorption. On the terms of appointment of respondents Nos. 1 and 2, it was specifically provided that their appointment was purely on an ad hoc basis for a period of six months from the date of their joining the post on a fixed salary of Rs-400/- with allowances that their services were liable to be terminated without notice. It

was also specifically mentioned that their appointment as such Temporary Engineers on ad hoc basis would not count towards seniority or increment in their salary. It was further stated that the posts of Temporary Engineers in Class II Service would be

advertised in due course by the Public Service Commission and that if they were not selected by the Commission, their services would be terminated without notice. They were also intimated that their inter-se seniority among the Temporary Engineers so recruited would be in the order merit in the list of candidates as settled by the Commission. It is common ground that respondents Nos. 1 and 2 were not recruited through the Public Service Commission. It was not till July 8, 1983 that the Secretary to the Commission conveyed to the State Government the approval of the Commission to the ad hoc appointment of 251 Temporary Engineers beyond the period of six months till regular appointments were made in the post of Assistant Engineers through the Commission. These are the facts on which there is no doubt or difficulty as to the principles applicables.

21. According to the accepted canons of service jurisprudence, seniority of a person appointed must be reckoned from the date he becomes a member of the service. The date from which seniority is to be reckoned may be laid down by rules or instructions (a) on the basis of the date of appointment (b) on the basis of confirmation (c) on the basis of regularisation of service (d) on the basis of the length of service, or (e) on any other reasonable basis. It is well-settled that an ad hoc or fortuitous appointment on a temporary or stop-gap basis cannot be taken into account for the purpose of seniority even if the appointee was qualified to hold the post on a regular basis as



such temporary tenure hardly counts for seniority in any system of service jurisprudence. In somewhat similar circumstances, in the case of *State of Gujarat v. C. G. Desai and others* 1974 SLJ 490, the question for consideration was whether in the case of Deputy Engineers directly recruited through the Public Service Commission by competitive examination, the service, if any, rendered by them as officiating Deputy Engineers prior to their appointment to Class II Service i. e. during the preselection period, could be taken into account for purposes of their eligibility for promotion as Executive Engineers under rule 7 (2) of the Bombay Engineering Service Rules, 1960 which provided for a period of 7 years' experience in Class II Service. The Government stand was that the service rendered by the direct recruits prior to their appointment to the Class II Service could not be taken into account in computing their eligibility of 7 years' experience in that class of Service and the Court upheld the stand. It was contended on behalf of the promotees that if for promotion to the post of Executive Engineer in Class I Service the period of eligibility of 7 years' experience in Class II Service was to start from the date of absorption in that class of service, then, for most of them there would be rare change of ever getting promotion as officiating Executive Engineers and as many of them had less than 7 years to go before attaining the age of superannuation. The contention was that rule 7(2) of the Rules did not permit discrimination

between the promotees and direct recruits in the matter of computing 7 years' service for further promotion as officiating Executive Engineers. This contention was repelled on the ground that direct recruits and promotees in Class II Service constituted two distinct groups or classes and the classification was based on intelligible differentia, and was observed :

"If a person, like any of the respondents, to avoid the long tortuous wait leaves his position in the 'never ending' queue of temporary/Officiating Deputy Engineers etc. looking for promotion, and takes a short cut through the direct channel, to Class II Service, he gives up once for all, the advantages and disadvantages which go with the channel of promotion and accepts all the handicaps and benefits which attach to the group of direct recruits. He cannot after his direct recruitment claim the benefit of his pre-selection service and thus have the best of both worlds. It is well-settled that so long as the classification is reasonable and the persons falling in the class are treated alike, there can be no question of violation of the constitutional guarantee of equal treatment."

In taking that view, the Court avoided a doctrinaire approach and approached the problem from a pragmatic view. It was said :



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"If the claim of the respondents to the counting of their pre-selection service is conceded, it will create serious complications in running the administration; it will result in inequality of treatment rather than in removing. If the pre-selection service as Officiating Deputy Engineers of direct recruits having such service, is taken into account for the purpose of promotion, it would create two classes amongst the same group and result in discrimination against those direct recruits who had no such pre-selection service to their credit".

22. It would be repugnant to all accepted concepts of service jurisprudence if the claim of persons like respondents Nos. 1 and 2 who were employed as Temporary Engineers on ad hoc basis de hors the rules for six months at a time were extended the benefit of their continuous officiation as such ad hoc employees in reckoning their seniority vis-a-vis direct recruits in considering their eligibility under Rule 6 (b) of the class I Rules for promotion to a higher grade or post of Executive Engineer. In *A. P. M. Mayakutty etc. v. Secretary, Public Service Department* (1977 SLJ 206), the question was whether the period of service rendered by such ad hoc employees appointed under rule 10 (a)(i)(1) of the Madras State and subordinate Service Rules purely on an ad hoc basis and as a matter of stop-gap arrangement, were entitled to count for the purpose of seniority, their period

of service on ad hoc basis during which they served in a stop-gap arrangement. It was held that such service could not be taken into account for the purpose of seniority from the date of their initial appointment. The Court speaking through Chandrachud, C. J. after referring to the provision contained in rule 10 (a) (i) (1) of the Rules, stated :

"This provision contemplates the making of temporary appointments when it is necessary in the public interest to do so to an emergency owing which has arisen for filling a vacancy immediately. Such appointments, in terms, are permitted to be made otherwise than in accordance with the rules. The letters of appointment issued to the appellants mention expressly that they were appointed under rule 10 (a) (i) (1), that the appointments were "purely temporary necessitated on account of the non-availability of regularly selected candidates conferring no claim for future appointment as Junior Engineers and that the appointment is liable to be terminated at any time without previous notice". In face of the provisions of the rule and the terms of the appointment it seems to us that the appellants were appointed purely as a matter of stop-gap or emergency arrangement. Since such service cannot be taken into account for purposes of seniority, the appellants cannot



contend that the entire service rendered by them from the date of their initial appointment must count for purposes of seniority.”

The Court distinguished the case of *C. P. Damodaran Nayar v. State of Kerala and Others* 1974 SLJ 195 on the ground that the temporary service rendered by District Munsiff recruited in a regular manner through the Public Service Commission could not, by any stretch of imagination, be considered to be purely as a matter of fortuitous or stop gap arrangement. The distinguishing features in Mayakutty's case, in the words of Chandrachud, C. J. were :

“The distinguishing feature of that case, which is highlighted in the judgement of the Court, is that the appellant therein was “appointed in a regular manner through the Public Service Commission” and therefore his appointment could not “by any stretch of imagination” be described as having been made to fill a purely stop-gap of fortuitous vacuum. In our case the initial appointment was not only made without any reference to the Public Service Commission but the various rules and the terms of the appellants' appointment to which we have drawn attention show that the appellants were appointed purely as a matter of fortuitous or stop-gap arrangement. The concurrence of the Public Service Com-

mission to the continuance of the appellants in the posts filled by them first after the expiry of three months and then after the expiry of one year, was obtained not with a view to regularising the appointments since their inception but for the purpose of meeting the requirements of a provision under which such concurrence is necessary to obtain if an appointment made without selection by the Public Service Commission is required for any reason to be continued beyond three months or a year.”

That precisely is the case here. It must therefore be held that the period of service rendered by person like respondents Nos. 1 and 2 were appointed on ad hoc basis purely as a stop gap arrangement for six months at a time dehors the rules, cannot be considered for purpose of their seniority in Class II Service or in reckoning their eligibility of 8 years' service in that class of service under rule 6 (b) of Class-I Rules.

23. We feel it necessary to emphasise that the principles laid down by this Court in the two cases of *N. K. Chauhan* and *S. B. Patwardhan* which were reiterated in *Baleshwar Dass'* case and subsequently followed in several other cases do not lay down any principle to the contrary. These cases are not an authority for the proposition relied upon. On the contrary, they clearly proceed on the principle that persons appointed on an ad hoc basis or fortuitous reasons or by stop gap arrangement,



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institute a class which is separate and distinct from those who are appointed to posts in the service in strict conformity with the rules of recruitment. In the case of S. B. Patwardhan, Chandrachud, observed:

"We however hope that the Government will bear in mind the basic principle that if a cadre consists of both permanent and temporary employees, the accident of confirmation cannot be an intelligible criterion for determining seniority as between direct recruits and promotees. All other factors being equal, continuous officiation in a non-fortuitous vacancy ought to receive due recognition in determining rules of seniority as between persons recruited from different sources, so long as they belong to the same cadre, discharge similar functions and bear similar responsibilities."

In Baleshwar Dass' case, Krishna Rao, J. affirmed the principle in his own characteristic and picturesque language:

"We must emphasise that while temporary and permanent posts have great relevancy in regard to the career of government servants, keeping posts temporary for long, sometimes by annual renewals for several years, and denying the claims of the incumbents on the score that their posts are temporary makes no sense and strikes us as arbitrary, especially when both temporary and per-

manent appointees are functionally identified. If in the normal course, a post is temporary in the real sense and the appointee knows that his tenure cannot exceed the post in longevity, there cannot be anything unfair or capricious in clothing him with no rights. Not so, if the post is, for certain departmental or like purposes declared temporary, but it is within the ken of both the Government and the appointee that the temporary posts are virtually long-lived. It is irrational to reject the claim of the 'temporary' appointee on the nominal score of the terminology of the post. We must also express emphatically that the principle which has received the sanction of this Court's pronouncements is that officiating service in a post is for all practical purposes of seniority as good as service on a regular basis. It may be permissible, within limits, for government to ignore officiating service and count only regular service when claims of seniority come before it, provided the rules in that regard are clear and categories and do not admit of any ambiguity and cruelly arbitrary cut-off of long years of service does not take place or there is functionally and qualitatively, substantial difference in the two



types of posts. While rules regulating conditions of service are within the executive Power of the State or its legislative power under proviso to Article 309, even so such rules have to be reasonable, fair and not grossly unjust of Articles 14 and 16."

We must also refer to the decision in *A. Janardhana v. Union of India and others* 1983 (1) SLJ 564. where Desai J. had occasion to observe :

"In other words after having rendered service in a post included in the service, he is hanging outside the service, without finding a berth in service, where as direct recruits of 1976 have found their place and berth in the service. This is the situation that stares into one's face while interpreting the quota-rota rule and its impact on the service of an individual. But avoiding any humanitarian approach to the problem, we shall strictly go by the relevant Rules and precedents and the impact of the Rules on the members of the service and determine whether the impugned seniority list is valid or not. But, having done that we do propose to examine and expose an extremely undesirable, unjust and inequitable situation emerging in service

jurisprudence from the precedents namely, that a person already rendering service as promotee has to go down below a person who comes into service decades after the promotee enters the service and who may be schoolian, if not in embryo, when the promotee is being promoted on account of the exigencies of service as required by the Government started rendering service. A time has come to recast service jurisprudence on more just and equitable foundation by examining all precedents on the subject to retrieve this situation."

To the same effect are the decisions in *O. P. Singla v. Union of India* (1984) 4 SCC 450. *G.S. Lamba v. Union of India* 1985 (1) SLJ 676. *P. S. Mahal v. Union of India* 1984(2) SLJ 197. and *Pran Krishna Goswami & others v. State of West Bengal and others* (1985) Supp SCC 222. It must now be taken as well established after these decisions that in the absence of any other valid principle of seniority, the inter se seniority between direct recruits and promotees should as far as possible be determined by the length of continuous service whether temporary or permanent in a particular grade or post (this should exclude periods for which an appointment is held in a purely stop-gap or fortuitous arrangement). No doubt, there are certain observations in the two cases of *G. P. Doval* and *Narender*



**A. P. Sen**  
**Judge**  
**Supreme Court of India**

Chadha which seem to run counter to the view we have taken, but these decisions turned on their own peculiar facts and are therefore clearly distinguishable and they do not lay down any rule of universal application.

24. For all these reasons, the appeal succeeds and is allowed. The judgement and order of the High Court quashing the impugned notification of the State Government dated December 20, 1978 making ad hoc promotions of the appellants and respondents Nos. 5-24 are set aside. Instead, we direct that the impugned order of the State Government making ad hoc promotions of 62 Assistant Engineers including the appellants and respondents Nos. 5-24 as officiating Executive Engineers will stand and they shall continue to function as such, subject to the terms and conditions contained in the aforesaid order till the process of making appointments by promotion to these posts is completed. We hope

and trust that the State Government will strike a just balance between the competing claims of these 62 Assistant Engineers promoted as Executive Engineers on ad hoc basis, and persons like respondents Nos. 1 and 2 appointed as Temporary Engineers on an ad hoc basis who could at the most claim that they should be given the benefit of the period of service from April 21, 1975 when they were recruited as Assistant Engineers through the Public Service Commission, provided they satisfy the test of eligibility of 8 years' experience in that class of service, while considering the case of all eligible members of Class II Service for promotion to the post of Executive Engineer in Class I Service in accordance with law and will complete the process of appointment within six months from today.

25. There shall be no order as to costs.

Appeal allowed.



IT IS THE ESSENCE OF DEMOCRACY  
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### OBSERVATION

U. P. Co-operative Societies Act, 1966—Section 122A—U.P. Primary Agricultural Co-operative Credit Societies Centralised Service Rules, 1976—Rules 13 and 25—Selection by Regional Administrative Committee but appointment was made by District Administrative Committee Whether termination can be made by District Administrative Committee—(Yes).

### OBSERVED BY

Mr. D. N. Jha, Mr. K. N. Goyal  
Hon'ble Judges, Allahabad High Court

### IN

W. P. No. 1559 of 1985 decided on 9th May, 1985.

### IMPORTANT POINT

*Termination of service made by the appointing authority is valid even if the selection had been made by some senior authority to the appointing authority.*

### TEXT

D. N. Jha and K. N. Goyal JJ. The petitioner was a Sachiv of Primary Agricultural Co-operative Credit Society and his services have been terminated by the District Administrative Committee. His grievance is that he was selected by the Regional Administrative Committee under R 25 of the U. P. Primary Agricultural Co-operative Credit Societies Central Service Rules, and as such his services could not be terminated by the District Administrative Committee. A reading of R. 13 with R 25 shows that while the recruitment is centralised at the regional level and as such the District Administrative Committee cannot make selection to the post of Sachiv on their own, the power of appointment has been vested in the District Administrative Committee Selection is

different from appointment. The appointment order annexure-1, itself brings out this distinction clearly. The appointments of the petitioner was made by the District Administrative Committee on his selection being made by the Regional Administrative Committee. As such it is not open to the petitioner to contend that his appointing authority was the Regional Administrative Committee. As such the District Administrative Committee was competent to terminate his services. No other illegality has been pointed out in so far as the termination order is concerned.

2. There is thus no merit in the petition which is dismissed in limine. The earlier stay order stands discharged.

Petition dismissed.



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K. Madhava Reddy

Member

Central Admn. Tribunal

## OBSERVATION

(i) All India Radio and Doordarshan (Recruitment of Director General, All India Radio and Doordarshan) Rules, 1985—Schedule—Post of Director General of A.I.R. and Doordarshan—To be filled by promotion having 3 years experience as Additional Director failing which by Deputation—In February 1985 vacancy occurred—Petitioner had not acquired 3 years experience till then hence not considered—Post filled by transfer on deputation for a period of six months—Whether the grievance of the petitioner that he was not considered when the vacancy occurred can be sustained—(No).

(ii) All India Radio and Doordarshan (Recruitment of Director General, A.I.R. and Doordarshan) Rules, 1985—Post of Director General—To be filled by promotion from Additional Director having three years experience failing which by transfer on deputation—Petitioner had not acquired requisite experience on the date when respondent No. 2 was initially appointed for six months by transfer on deputation—Proposal for continued appointment of the petitioner after the expiry of the said period of six months—Petitioner who had acquired requisite experience by then not considered for the contention that proposal as such was initiated prior to the date of acquisition of requisite experience by petitioner—Contention of Respondent repelled—The tenure position as on date when the post would fall vacant ought to have been earlier presented to the appointment committee and considered—Result—Continued appointment of respondent No. 2 as Director as such quashed.

(iii) Constitution of India, Article 309—All India Radio and Doordarshan (Recruitment of Director General A.I.R. and Doordarshan) Rules, 1985—Promotion to the post of D. G.—Rules required 3 years experience when vacancy first vacant—Contention that post of D. G. being sensitive post—The incumbent ought to have experience of more than 3 years—Contention repelled—Government cannot claim superior wisdom to the Legislature Authority.

(iv) Constitution of India, Article 309—Rules framed under the Departmental instructions—Department instructions cannot override, modify the rules framed as such.

(v) All India Radio and Doordarshan (Recruitment of Director General A.I.R. and Doordarshan) Rules, 1985—Schedule column 7 read with col. 11 providing experience for the post in case of deputationist 18 years in a supervisory capacity in educational, cultural publicity etc—Respondent No. 2 appointed as such has 18 years experience but not that of education, cultural publicity department—Whether his appointment can be considered as valid—(No.)

## OBSERVED BY

Mr. K. Madhava Reddy and

Mr. Kaushal Kumar



Hon'ble Members, Central Administrative Tribunal (Principal Bench, Delhi).

## IN

O.A. No. 27/86, decided on 7th August, 1986, in the case of Amrit Rao Shinde  
 Petitioner v. Union of India, Respondent.

## IMPORTANT POINT

*Once recruitment to a post is governed by the rules framed under Article 309 of the Constitution, the recruitment has to be in accordance with the rules. Any appointment made in derogation of the said rules would be illegal and unsustainable.*

## TEXT

Justice K. Madhava Reddy Chairman—In this Application under Section 19 of the Administrative Tribunals Act, 1985, the Applicant calls in question the appointment of the second respondent, as Director General, All India Radio (D.G. AIR for short) and prays for a direction that he be considered for the post of Director General, AIR without further delay. The few facts necessary to appreciate the contentions raised may be briefly noticed.

2. The applicant was appointed Deputy Director General, All India Radio on May 7, 1979. The post of Additional Director General, All India Radio in the scale of Rs. 2,500-2,750 was created on March 2, 1981. On the advice of the Department of Personnel and the Union Public Service Commission, Rules for recruitment to the post of Additional Director General were framed and notified on August 31, 1981 under which a Deputy Director General with five Years' experience in the Grade was eligible for promotion to the post of Additional Director General. Neither the applicant nor

any one else then possessed the requisite qualification for appointment to that post. Under those special circumstances, in relaxation of the Rules' the applicant was appointed as Additional Director General on August 24, 1982 and he took charge of the post on August 30, 1982.

3. Recruitment to the post of Director General, All India Radio was governed by the All India Radio Recruitment of the Director General, All India Radio Rules, 1963. The post of Director General, All India Radio fell vacant due to the retirement of Shri K.C. Sharma. Rules for recruitment to the post of Director General were amended on September 30, 1982 making inter alia the Additional Director General with three years' regular service in the said grade or post eligible for promotion as Director General. The second respondent herein was then the Joint Secretary in the Ministry of Information and Broadcasting and was asked to hold current charge of the duties of the post of Director General. He remained incharge of that post till January 31, 1983, when Shri S. S.



**K. Madhava Reddy**  
**Member**  
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Shri S. S. Sharma, an I. A. S. Officer was appointed to the post of Director General, A I R. Until March 31, 1984 the post of Director General, Doordarshan was in the scale of Rs. 2500-2750. The Government upgraded the scale and brought it par with the Director General of All India Radio i. e. Rs. 3000/- (Rupees three thousand) (fixed). Fresh Rules of recruitment to the posts of Director General of All India Radio and Doordarshan were made and notified on February 27, 1985 (GSR 103 (E) Government of India, Ministry of Information and Broadcasting dated February 27, 1985). Shri S. S. Sharma who was holding the post of Director General, All India Radio was promoted as Secretary in the Department of Textiles and once again the post of Director General, All India Radio fell vacant on 14-2-1985.

4. The applicant who took charge as Additional Director General, All India Radio on August 30, 1982 had not completed the requisite qualifying service of three years in the Grade for being considered to the post of Director General, A I R which fell vacant on February 14, 1985. Even before that date, the post of Director General, Doordarshan was filled in by appointment of Shri Harish Khanna on re-employment which was regularised under the Amended Rules of 1985. The second respondent who was then holding the post at the level of Additional Secretary, Ministry of Information and Broadcasting was appointed to the post for a period of six months with effect from March 4,

1985. The appointment of the second respondent was to terminate on the afternoon of September 3, 1985. The Applicant had by August 30, 1985 put in three years of service in the grade of Additional Director General, All India Radio well before six months term of Respondent No. 2 as Director General which was to expire on September 3, 1985.

5. It is the case of the Applicant that although the petitioner was duly qualified to be considered for promotion to the post of Director General, All India Radio and should have been considered before any one else could be considered for appointment by transfer on deputation, the Applicant was not considered and the second respondent who was not qualified under the Rules was appointed by transfer on deputation. It is this appointment of the second respondent and the failure to consider the Applicant for the post of Director General, All India Radio that is called in question in this Application.

6. The All India Radio (Recruitment of Director General, All India Radio) Rules, 1963 as amended on February 27, 1985 called All India Radio and Doordarshan (Recruitment of Director General, All India Radio and Doordarshan) Rules, 1985 prescribe the method of recruitment and qualifications for the post of Director General. All India Radio /Doordarshan in the Schedule appended to the said rules which reads as follows :



Ministry of Information and Broadcasting Notification  
New Delhi, the 27th February, 1985

**SCHEDULE**

1. Director General 2\* All India Radio/  
Doordarshan.

(1984) "Subject to variation depen-  
dent on work load.

General Central Service Group "A"  
Gazetted.

Rs. 3,000/- (fixed)

Selection
- (1) Name of post

(2) No. of post

(3) Classification

(4) Scale of pay

(5) Whether Selection Post or non-  
Selection Post.

Not exceeding 50 years (Relaxable for Govt. Servants by 5 years in accordance with the instructions or-  
ders; issued by Central Government.  
NOTE : The crucial date for deter-  
mining the age limit shall be the clo-  
sing date for receipt of Applications  
from candidate in India other than  
those in Andaman & Nicobar Islands  
and Lakshadweep).

No

**SCHEDULE (Contd)**

Essential : (i) Degree from a recog-  
nised University or equivalent ; (ii)  
18 years experience in a supervisory  
capacity in educational, cultural pub-  
licity or professional Institution/  
organisation, including adequate  
general administrative experience  
with ability and capacity for orga-

(6) Age limit for direct recruits.

(6A) Whether benefit of added years of  
service admissible under the Rule  
30 of the Central Civil Services  
(Pension) Rules, 1972.  
Educational and other qualifica-  
tions required for direct recruits.



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**Member**

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nisation.

Knowledge of India's Cultural heritage and of different forms of literary, cultural and artistic expressions in the country.

Knowledge of current affairs and contemporary thought NOTE : 1. Qualifications are relaxable at the discretion of the Union Public Service Commission in place of candidates otherwise well-qualified x x x

Note 2 :

No

2 years.

#### **SCHEDULE (Contd.)**

50% by promotion failing which by transfer on deputation and failing both by direct recruitment.

50% by re-employment or transfer on deputation or direct recruitment the exact method of recruitment to be decided in consultation with the UPSC on each occasion.

Promotion : Additional Director General, All India Radio/Doordarshan with years' regular service in the grade.  
Re-employment : Retired Officers of all India-Services or Central Service group " who were working against the posts additional Secretary to the Government of India or equivalent on the

x x x Note : The qualification regarding experience is/are relaxable at the discretion of the Union Public Service Commission in the case of candidates belonging

(7) Scheduled Caste and Schedule Tribes if, at any stage of the selection, the Union Public Service Commission is of the opinion that sufficient number of candidates, from these communities possessing the requisite experience are not likely to be available to fill up the vacancies reserved for them.

(8) Whether age and Educational qualifications prescribed for direct recruits will apply in the case of promotees.

(9) Period of Probation, if any.

(10) Method of recruitment, whether by direct recruitment or by promotion or by deputation/transfer and percentage of the vacancies to be filled by various method.



date of their retirement and possessing experience of the type mentioned in (ii) under Column 7. Note in the case of re-employment such re-employment shall not continue beyond the age 62. Transfer on Deputation : Officers of All India Services or Central Services Group "A" working in or eligible for appointment to the post of Additional Secretary to the Government of India and possessing experience of the type mentioned in (ii) under Column 7.

"(The Departmental Officers in the feeder category who are in the direct line of promotion will not be eligible for consideration for appointment on deputation. Similarly, deputationists shall not be eligible for consideration for appointment by promotion Period of deputation including the period of deputation in another ex-cadre post held immediately preceeding this appointment in the same organisation/department shall ordinarily not exceed 5 years.)"

Group "A" Departmental Promotion Committee (for considering promotion and confirmation).

(i) Chairman/Member, Union Public Service Commission.

-Chairman

(ii) Secretary, Ministry of Information and Broadcasting --

Member,

Consultation with the Commission necessary while making direct recruitment and selecting an Officer for appointment on re-employment,

(11) In case of recruitment by promotion/deputation/transfer, grade from which promotion/deputation transfer to be made.

(12) If a departmental promotion Committee exists, what is its composition.

(13) Circumstances in which Union Public Service Commission is to be consulted in making recruitment.



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"The Principal rules were notified by G. S. R. No. 1/55 dated 6-7-1963 and subsequently amended vide G. S. R. No. 874 dated the 16-10-1982.

7. It is clear from the rules extracted above that out of the two posts of Directors General, one of AIR and the other of Doordarshan one was to be filled primarily by promotion if the other post was filled in by direct recruitment, re-employment or deputation. By the time the post of D. G., AIR was vacant on 14-2-1985 Shri Harish Manana had been appointed on re-employment as Director General, Doordarshan and his appointment was regularised under the amended rules. As per the rules, the other post of the Director General, AIR was, therefore, to be filled primarily "by promotion failing which by transfer on deputation and failing that by direct recruitment" as laid down in col. 10 of the Schedule. There is no dispute as regards this factual position. There is also no dispute that this post was not filled in by promotion but was filled in by transfer on deputation. This appointment was made on 10th December, 1985 by way of continuation of the earlier appointment of Respondent No. 2 beyond 9-1985 upto 3rd March, 1987. Admittedly, by that date the petitioner who was Additional Director General had put in more than three years of service in the grade and as such was fully qualified for being considered for promotion to the post of Director General, AIR. It was conceded in para 25 of the Reply that

"when the vacancy of Director General, AIR became under consideration, there was only one regularly appointed Additional D. G., namely Shri Shinde". The rule requires that in such a situation this post should be filled in by promotion and only if the person qualified to be promoted is not available or found suitable and is not selected, then the question of considering the appointment to the post by transfer on deputation would arise. It was, therefore, obligatory for the respondents to have initially considered the Applicant for promotion before considering the continuation of the second respondent until 3-3-1987. That has not admittedly been done.

8. The action of continuing the appointment of the second Respondent is sought to be justified on the ground that when he was initially appointed on 4th March, 1985, the Applicant had not put in the requisite qualifying service of three years as Additional Director General and there being no person qualified for promotion, the second respondent was appointed by transfer on deputation. Although the Applicant has contended that even this appointment by transfer on deputation was illegal, we are unable to accept this contention. Neither the Applicant nor anyone else was qualified to be promoted as D. G., AIR in accordance with the Rules on that day. The method of promotion to the post of Director General, AIR had thus failed when the vacancy occurred in February, 1985. No excep-



tion can, therefore, be taken to the appointment by transfer on deputation instead of by promotion. Even so, whether the second respondent was qualified to be appointed even on transfer on deputation in February, 1985 and his appointment could be continued upto 3-3-1987 is another matter which we would consider later. So far as the Applicant is concerned, he cannot make a grievance that he was not considered for promotion. The grievance of the Applicant that he was not considered for promotion when the vacancy occurred in February, 1985 cannot be sustained. The continuation of the second respondent as Director General, AIR vide Notification issued on 10-12-1985 upto March 1987, however, stand on a different footing. By August 30, 1985, the Applicant who had taken charge on August 30, 1982 had completed three years of service as Additional Directors General, AIR and was thus fully qualified to be appointed as Director General, AIR by way of promotion. The excuse for not considering the Applicant as put forth in the reply has to be stated to be rejected. In paragraph 25 of the reply it is pleaded "when the vacancy of D. G., AIR became under consideration, there was only one regularly appointed Additional D. G., namely Shri Shinde and he had not completed the prescribed period of three years service on the date the proposals for appointment to the post of D. G. were made. Therefore, proposal for the continued appointment of Shri Mathur for a further period was processed". This statement is

not altogether incorrect ; but it does not disclose the entire position correctly and leads one to the desired conclusion if not probed into. Under the Rules the relevant date with reference to which the position should have been examined is the date when the six months term of the second Respondent's appointment was to conclude. The fact that this question of continuation of the second respondent was taken up before the Applicant had put in three years of service can have no bearing on the question whether on the date when the post was to fall vacant, it should be filled in by promotion or by transfer on deputation. Under the rules, as already stated, when the post is to be filled in, it has to be primarily filled in by promotion and only when the method of promotion failed, it could be filled in by transfer on deputation and when both these methods fail, by recruitment. When the initial appointment of the second respondent expired and the post fell vacant on 3-9-1985, as the Applicant was fully qualified for being considered for promotion, the Rules did not permit the Respondents to consider appointment by transfer on deputation. Even if the proposal was initiated earlier, the entire position as on 3-9-1985 when the post would fall vacant, ought to have been clearly presented to the Appointments Committee and considered. In other words, the Applicant who was duly qualified should have been first considered for promotion and that consideration under the rules, could only be by a DPC. Admittedly, this



p had not been taken. Only if the PC having considered him did not find him fit for promotion, the question of considering anyone else for appointment by transfer on deputation including the question of continuation of second respondent could have arisen. Presumably, this aspect was not even presented to the Appointments Committee. The appointment of the second respondent although stated to be by way of continuation, is still an appointment made on 10th December 1985 so that it may continue without any break from 3-9-1985. That the Applicant by that time was fully qualified for consideration for promotion was conveniently ignored. Merely because on the date the case was processed the Applicant was not qualified, he does not lose his right to be considered for promotion when he was fully qualified on the day the vacancy arose. The order appointing the second respondent on 10th December, 1985 and continuing him as Director General is, therefore, unsustainable and must be quashed. The by-passing of the Applicant was also sought to be justified on the plea that when on 30-8-85 by which time Shri Indre would have completed three years of service as Additional D.G. he had service of six years in the scale of Rs. 2000-2250 and above. It was felt that he would have found it difficult to meet the job requirements of this very sensitive post." The defence again is wholly untenable. To hold that one should have waited in more than three

years as Additional D.G. to "meet the job requirements of the post of D.G.", a post which is described as sensitive in the counter affidavit by the under Secretary to Government is to claim superior wisdom to the Legislative Authority which framed the Rules in exercise of the powers under the proviso to Art. 309 of the Constitution and cannot be countenanced.

9. So is the plea raised in paragraphs 10 and 11 of the Reply that the composite method of recruitment was followed and that para 3.12.5 of the Instructions of the Department of Personnel authorises it. The relevant portion of that para reads as follows :

"In cases where the field of promotion consists of only one post, the method of recruitment by "transfer on deputation (including short term contract)/promotion is prescribed so that the departmental officer is considered along with outsiders."

10. Firstly this deals with "cases where the field of promotion consists of only one post". Here there are two posts of Director General, AIR and Director General, Doordarshan. Hence these instructions have no bearing on the issue before us. But a far more formidable objection is that any such departmental instructions cannot override, not even modify the Rules framed under the Proviso to Art. 309 of the Constitution. Any umbrage under these instructions would not afford any protection to the appointment of second Respondent which is contrary to the



### Service Rules.

11. The next question that was canvassed before us and that would become relevant because the appointment of second respondent is being quashed and the first respondent would be required to fill in the post in accordance with the rules is : whether the second respondent was qualified to be appointed under the rules either in March, 1985 or later in December, 1985. The appointment of the second respondent being by way of transfer on deputation, he is required to possess the qualification mentioned in col. 7 read with col. 11 of the Schedule extracted above. According to the said rules, a person to be appointed by transfer on deputation must be an officer of All India Service or Central Service Group 'A' and such an officer should be working in or be eligible for appointment to the post of Additional Secretary to the Government of India. The second Respondent possessed this qualification. The further qualification prescribed is that such an officer should be possessing experience of the type mentioned in clause 2 under col. 7 which reads as under :

"18 years experience in a supervisory capacity in educational, cultural publicity or professional Institution/Organisation, including adequate general administrative experience with ability and capacity for organisation".

12. While it is contended for the petitioner that the Respondent No. 2

does not have this experience, the respondents have sought to substantiate that he does possess the qualification envisaged under col. 11 of the Schedule in respect of appointment by transfer on deputation. In their counter affidavit the various positions held by the second respondent during the course of his service are enumerated as under :

1956 : Joined Indian Administrative Service (Madhya Pradesh Cadre).

1967 : Managing Director, Tribal Co-operative Development Corporation, where his duties included development of small-scale industries by organising infra-structure, raw material and marketing, promotion of the development of handlooms and handicrafts industry and establishment of co-operative movement in the tribal area.

1969 : Deputy Secretary in Cabinet Secretariat.

(ii) Later, Director in-charge of Manpower and Employment

August 1972 to : Secretary to Chief Minister, Government of West Bengal.

January, 1973 : Chief of Division in charge of State Plan and Multi-level Planning Division in the Planning Commission. Later, appointed as Joint Secretary to the Government of India and continued in the same Division.

May, 1977 : Hill Commissioner, Secre-



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tary, Planning, Finance, PWD, Power, Food and Civil Supplied in the Government of Manipur. Later, Additional Chief Secretary and Chief Secretary to the Government of Manipur.

y, 1980: Joint Secretary in the Ministry of Information and Broadcasting dealing with Information Media viz, Cinema, Press DAVP and with the Broadcasting Media, namely AIR and Doordarshan.

tober, 1983: Appointed an Additional Secretary to the Government of India and posted as Secretary, UPSC.

12. The second Respondent has been in government service for more than 18 years but what the rules require is 18 years experience in a supervisory capacity in educational, cultural publicity or professional Institution/Organisation. This experience should also include "adequate general administrative experience". An Administrative Officer who has been working for 18 years long, would undoubtedly be having adequate general administrative experience. But the rule further requires that such experience should be "in educational, cultural publicity or professional institutions/organisations". The qualifications stated in the additional affidavit do not disclose that the second respondent has adequate experience "in educational, cultural publicity or professional institutions/organisations". It was however, argued that the experience possessed by the second respondent as an administrative officer would be sufficient to hold that he fulfils

the qualifications laid down in col. 11 for it does not lay down that the person sought to be appointed by transfer on deputation should have the same qualification but prescribes only "of the type" mentioned in col. 7. Even so, it should be in educational, cultural publicity or professional institutions/organisations. The second Respondent had wide experience but it is not in any of these institutions/organisations. He does not therefore, fulfil the requirement as to qualifications laid down under the said rules. Even if his experience as a Joint Secretary in the Ministry of Information and Broadcasting is deemed to be experience in the organisation of the type referred to in col. 11 of the Schedule to the rules his experience in that organisation is not of 18 years' duration; it is only of three years and a few months.

13. A combined reading of columns 7 and 11 would disclose the legislative intent that the requirement of professional experience of 18 years including general administrative experience was prescribed for outsiders and not for departmental candidates. The reason for this distinction is obvious. For promotion only an Additional D. G. of AIR/Doordarshan with three years service in the grade is eligible for consideration. By that time he has already the requisite exposure and experience of his own organisation which he would need on promotion. The Rule making Authority in its wisdom thought that outsiders only with longer experience in certain specified field, though strangers to AIR/Doordarshan could be thought of As the



second Respondent did not fulfil the qualifications prescribed by the rules either on the date he was initially appointed in March, 1985 for six months or on 10th December, 1985 when that appointment was extended upto March, 1987, his appointment cannot be considered to be valid. The rules also do not vest in the respondents any power to relax them. Only in the case of direct recruitment, as laid down in Note 1, the qualifications are relaxable at the discretion of the U.P. S.C. and none else in case of candidates otherwise well qualified and as laid down in Note 2, the qualifications regarding experience are relaxable at the discretion of the U.P.S.C. only in the case of candidates belonging to Scheduled Caste and Scheduled Tribes, if, at any stage of the selection, the Union Public Service Commission is of the opinion that sufficient number of candidates, from these communities possessing the requisite experience are not likely to be available to fill up the vacancies reserved for them. Even this limited power of relaxation vested under the Recruitment Rules is not per-

mitted to be exercised in case of appointments by transfer on deputation. Under these Rules, there is no general power of relaxation vested in any authority whatsoever. Power to exempt is vested in the Central Government to the limited extent mentioned in the proviso to Rule 5 of the 1963 Rules which deals with disqualifications. Once recruitment to a post is governed by the rules framed under Article 309 of the Constitution, the recruitment has to be in accordance with the rules; any appointment made in derogation of the said rules would be illegal and unsustainable. In this view of the matter, the appointment of the second respondent is quashed and the respondents are directed to fill up the post of the Director General, AIR in accordance with the Rules and consider the case of the Applicant who is duly qualified, under the rules, for promotion.

14. This Application is accordingly allowed but in the circumstances we make no order as to costs.

Application allowed.



**Asha Mukul Pal**  
**Member**  
**Central Admn. Tribunal**

### OBSERVATION

(i) Authority competent to issue charge sheet—Applicant on deputation with Central Electricity Board—Charge sheet issued by Chief Commissioner—Appointing authority President—Propriety—Held authority to institute proceedings need not necessarily be the appointing authority vide Rule 13 (2) CCS (CCA) Rules.

(ii) Charge sheet—Framing of—Charge sheet indicates possession of disproportionate assets acquired by questionable means—Charged under rule 3 (1) (i) of CCS (Conduct) Rules 1964—Whether charge is vague—(No) Charge specific and complete even without mentioning rule 3 (1) (i).

(iii) Charge sheet indicates possession of disproportionate assets raising presumption that the applicant acquired them by questionable means—Does show 'closed mind'—(No).

(iv) Suspension order issued after starting the proceedings, is it valid—Covered by rule 10 (1) (a) CCS (CCA) Rules.

### OBSERVED BY

Mr. Asha Mukul Pal and  
 Mr. B. Mukhopadhyay  
 Hon'ble Members, Central Administrative Tribunal

### IN

T.A. No. 944 of 1986 decided on 20th May, 1986.

### IMPORTANT POINTS

(i) Authority competent to issue charge sheet and order suspension may be different than Appointing authority.

(ii) Where charge is specific, the vagueness of the rule cited will not vitiate the charge sheet.

### TEXT

Asha Mukul Pal, Vice-Chairman. — This is an application under Article 226 of the Constitution of India moved by Mr. Bhagat Singh, Deputy Director, Central Electricity Authority before the Hon'ble High Court at Calcutta on 4-12-1978. A Rule was issued and an interim order of injunction was passed in terms of Prayer (e) of the application first for a fortnight and then extended to till the disposal of the Rule. The case has subse-

quently been transferred to this Tribunal under Section 29 of the Administrative Tribunals Act, 1985.

2. The subject matter of the challenge is the chargesheet at Annexure-B and the suspension order at Annexure-D of the application. There was also a prayer for restraining the respondents from reverting the applicant to his parent department before June, 1979, a date which is long past. This, prayer is



therefore no longer of any consequence.

3. The applicant was initially appointed as Section Officer in the Electricity Deptt. of the Andaman & Nicobar Administration and was ultimately promoted to the post of Executive Engineer in June, 1973 on an ad hoc basis. His services were placed at the disposal of the Ministry of Energy for appointment to the grade of Deputy Director/Executive Engineer under the Central Electricity on deputation for a period of three year by an order dated 23rd February, 1976 and the applicant joined the post of Executive Engineer, Southern Regional Electricity Board at Bangalore under the Central Electricity Authority on or about 15th June, 1976. On January 18, 1978 he was served with the chargesheet at Annexure-B issued by the Chief Commissioner, Andaman and Nicobar Administration. The suspension order was passed in connection with this departmental enquiry by the Chief Commissioner, Andaman and Nicobar Administration on 18th October, 1978. The prayer of the applicant is for quashing both the chargesheet and the suspension order.

4. Mr. N. Chakraborty, counsel for the applicant, has attacked the chargesheet from several angles. His first contention is that the Chief Commissioner was not competent to issue the chargesheet. Since the applicant was on deputation to the Central Electricity Authority in a Class A post, his appointing authority while on deputation, was the President of India according to Rule 2 (a) of the Central Civil Services (CCA) Rules. The Chief Commissioner,

Mr. Chakraborty argue, being subordinate to the President of India, had no authority initiate departmental proceedings and issue chargesheet against the applicant when he was on deputation. This contention has been effectively refuted to Shri Banerjee counsel for the respondents. Mr. Banerjee point out that the disciplinary proceedings may not always be instituted by the appointing authority; the disciplinary proceedings may be instituted by the disciplinary authority as laid down in Rule 13 (2) of the CCS (CCA) Rules. A disciplinary authority has been defined in Rules 2 (g) of the said rules as the authority competent to impose any of the penalties specified in Rule 11. By notification No. F 7/16/84 Ests. (A) dated 30th May, 1964 the Chief Commissioner, Andaman and Nicobar Islands has been authorised to impose penalties specified in Clauses (i), (ii) and (iii) of Rule 11 of the said rules on a member of Group 'A' Service and, therefore, by virtue of this Notification the Chief Commissioner is the competent authority to institute disciplinary proceedings against the applicant. We are inclined to agree with Mr. Banerjee. This contention of Mr. Chakraborty, therefore, is of no avail.

5. The next ground of attack of Mr. Chakraborty is that the chargesheet is not maintainable because the first charge against the application is in contravention of Rule 3 (1) (i) of the Central Civil Services (Conduct) Rules, 1964 and that mere contravention of Rule 3(1) (i) does not constitute a misconduct in support of his argument Mr.



kraborty relies on *A. K. Kalra v. the Project & Equipment Corporation of India Ltd.* AIR 1984 SC 1361.

6. We may discuss the ratio of the case cited above and examine the charge-sheet against the applicant in the light of that ratio. Rule 3 (1) (i) of the CCS (Conduct) Rules runs as follows.

“Every Govt. servant shall at all times maintain absolute integrity”.

Their Lordships held that such a charge was vague and of a general nature. It is obligatory on the disciplinary authority to specify and, if necessary, define with precision and accuracy what constitutes a misconduct. Mere violation of a general provision such as contained in Rule 3 (1) does not constitute misconduct and no penalty can be imposed for such violation. A charge which rests on the general definition of failure to maintain absolute integrity as a public servant may not be amenable to objective evaluation and may, therefore, lead to arbitrary and unfair penalisation of the public servant concerned. In this case cited above the impugned officer was charged with not refunding the advance taken for house-building and not returning the advance taken for purchasing motor cycle within stipulated time. He was removed from service after enquiry on the ground that he violated rules for granting house building advance amounted to not maintaining absolute integrity and thus he was held guilty of misconduct. Their Lordships held, as we have discussed above, the charge framed against the impugned employee did not independently

constitute a misconduct and the description of failure to maintain absolute integrity was vague and of a general nature that could not justify the charge of misconduct. Moreover, the rules for granting advances themselves provided the consequences of breach of the rules. There was, therefore, no ground for initiating disciplinary enquiry as the breach of rules did not constitute misconduct.

7. We may now examine the charge against the applicant. The relevant portion of the charge runs as follows :

“That the said Shri Bhagat Singh ..... was found on 31-12-1975 in possession of assets either in his own name or in the name of his family members which are disproportionate to his known sources of income to the extent of Rs. 121980/which he could not satisfactorily account for and which raises presumption that the said Shri Bhagat Singh acquired the said disproportionate assets by questionable means and or from dubious sources and that thereby he failed to maintain absolute integrity as a public servant contravening rule 3 (1) (i) of the Central Civil Services (Conduct) Rules, 1964”.

It is thus seen that the basic charge against the applicant is possession of assets disproportionate to his known sources of income. This by itself constitutes a misconduct defined in Section 5(1) (e) of the Prevention of Corruption Act, 1947. There is no vagueness or lack of specificity in it and there is no scope for different subjective evaluations of



the charge. It is true that contravention of Rule 3 (1) (i) has been mentioned as part of the charge but even if this part is removed and even if it were not there the charge does not fall through; what remains clearly constitutes a misconduct. The portion of the charge relating to contravention of Rule 3 (1) (i) is redundant to the charge. The circumstances and the content of the charge of the instant case are, therefore, eminently distinguishable from those of Kalra's case cited by Mr. Chakraborty. We are of the opinion that the charge is specific and properly framed and does not suffer from any defect that makes it not maintainable. This contention of Mr. Chakraborty, therefore, fails.

8. The third point taken by Mr. Chakraborty is that the disciplinary authority who served the charge sheet had a closed mind. It would appear, according to Mr. Chakraborty, from the language of the charge sheet itself that the disciplinary authority had already made up his mind because the charge states that the possession of disproportionate assets and the failure to satisfactorily account for these assets raised the presumption that the applicant acquired the said disproportionate assets by questionable means and/or from dubious sources. Mr. Banerjee answers this point with the argument that mere mention of the word "presumption" does not vitiate the charge because there has been no attempt on the part of the disciplinary authority to transfer the onus to the impugned officer and the evidence for pro-

ving possession of disproportionate wealth has all along been led by the prosecution. In support of his contention Mr. Banerjee relies on *Sunil Kumar Mukherjee v. State of West Bengal & Ors.* Calcutta High Court Notes, 1977 Page 1014. In para 10 of their judgement in the said case, their Lordships held "the two words 'found' and 'giving rise to the presumption' are not in our judgement enough by themselves to make the charge in this case in limine, bad and void on the ground of violation of the principles of natural justice. The word 'found' is a general word and it will depend on the context of the situation where that expression means a bias..... Secondly, the words 'giving rise to the presumption' can not also be conclusive in this particular context of facts because we find no examination of the records that no presumption in fact was drawn and that it was the employing authorities who led the evidence and there was no misplacement of onus of proof" We are respectfully in agreement with the above observation and we accept the argument of Mr. Banerjee. Mr. Chakraborty's attack on this count also, therefore, fails.

9. Mr. Chakraborty has also assailed the conduct of the enquiry on several counts involving violation of the relevant rules and consequent offence against the principles of natural justice. These arguments are not germane to the subject-matter of challenge in the instant case. We are, therefore, not dealing with these arguments here. It would be more appropriate to take up these points for consideration when



**Asha Mukul Pal**  
**Member**  
**Central Admn. Tribunal.**

to hear another writ applicant of this case pending before this Tribunal where the subject-matter of challenge is the punishment show-cause notice issued after the completion of the departmental inquiry.

10. Mr. Chakraborty has assailed the order of suspension on two scores :

- (i) The Chief Commissioner, Andaman & Nicobar Administration was not the competent authority to issue the order of suspension because the applicant was on deputation of the Central Electricity Authority in a Group A post and his appointing authority was the President of India. Mr. Benerjee, however, points out that Rule 10 of the CCS (CCA) Rules provides that the disciplinary authority is competent to place a Govt. servant under suspension and we have already seen that the Chief Commissioner was the disciplinary authority for the applicant even when he was on deputation. We, therefore hold that the Chief Commissioner was the competent authority to issue the suspension order ;

- (ii) The suspension order was not issued prior to the institution of the departmental proceedings. It was issued only after the departmental proceeding was concluded when there was no justification for the issue of such suspension order. Mr. Benerjee has invited our attention to Rule 10 (1) (a) of CCS (CCA) Rules wherein it is provided that the suspension order may be issued when a disciplinary proceeding. In the instant case the disciplinary proceeding was evidently pending when the suspension order was issued. There was therefore an irregularity in the issue of the suspension order on this court.

11. In view of what has been discussed in the aforesaid paragraph, we come to the conclusion that the application has no merit and the prayers made by the applicant cannot be granted. We dismiss the application. There will be no order for costs. The interim order is vacated. Mr. Madhusudan Benerjee verbally prays for a stay of the operation of the order. The prayer is refused.

Application dismissed



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### OBSERVATION

Surplus staff —Re —employment of —Petitioners in grade Rs. 570-1080 but allotted 330-560 on redeployment after being rendered surplus, would have been without job if no alternative was offered by government. No vacancies in grade Rs. 425-700 which was equivalent to old grade— Can they claim higher grade as a matter of right—(No).

### OBSERVED BY

Mr. Amarjeet Chaudhary and

Mr. V. S. Bhira

Hon'ble Members, Central Administrative Tribunal (Chandigarh Bench)

### IN

T.A. No. 28 of 1986, decided on 21-5-1986, in the case of Neel Kamal Khanna Petitioner v. Union of India, Respondent.

### IMPORTANT POINT

*Employees rendered surplus from one organisation cannot claim equivalent grade as a matter of right in the new post.*

### TEXT

V.S. Bhira, A. M. —This order will also dispose of three other applications bearing No. 24 of 1986, 20 of 1986 and 30 of 1986 filed by the applicants, namely, Banta Singh Banyal, Mohinder Kumar Tandon and Ashok Kumar, respectively. The learned Counsel for the applicants and respondents agreed to this course of action.

2. The applicants worked as Research Assistants in the Beas Construction Board from 5-11-1969 to 23-5-1984, Consequent upon the completion of the Beas Construction Project, they were declared surplus and taken on the rolls of Central (Surplus Staff) Cell w.e.f. 1-12-1984. In

the Beas Construction Board, the applicants were in the pay scale of Rs. 570-1080. The Department of Personnel, which redeployed the staff in the Surplus Cell, fixed the pay scale for the applicants as Rs. 330-560. The pay scale in Beas Construction Board takes into account consumer price index at 320 points, while the Central pay scale given by the Department of Personnel takes into account consumer price index at 200 points only, hence the difference in the two pay scales. The learned Counsel for the applicants argued that they should be given the Central pay scale of Rs. 425-700, which is applicable to the Research Assistants working in the Government of India for



instance in the Central Water Commission). It has been argued that for other categories of staff namely Section Officers, Draftsmen, Junior Scale Stenographers and Lower Division Clerks, identical designations exist in the Beas Construction Board as well as the Central Govt. offices and the existing central pay scales have been offered to the staff in corresponding grades redeployed from the erstwhile Beas Construction Board. It is only in the case of Research Assistants that the Central pay scale of Rs. 3350-500 has been given, although the Central pay scale for Research Assistants is higher, viz Rs. 425-700.

3. It has been stated that Beas Construction Board pay scale of Rs. 570-1080, which is based on consumer price index of 200 points, really works out to central pay scale of Rs. 409.10 p-797.70 p if the dearness allowance is calculated with reference to consumer price index of 200 points, which is applicable for central pay scales. The learned Counsel for the applicants, therefore, argued that they should be given Central Pay Scale of Rs. 425-700 after redeployment in the Central Govt. It was also stated that though they are science graduates having about 15 years experience in the technical field as Research Assistants in the Beas Construction Board, their experience is not being made use of by their present posting to the routine job of Upper Division Clerks in the office of Collectorate of Central Excise, Chandigarh.

4. The learned Counsel for the res-

pondents explained that as per the scheme for redeployment of surplus staff of the Ministry of Home Affairs, the employees of the erstwhile temporary organisations created for a specified purpose (like Beas Construction Project), which had existed for not less than 15 years, could be brought over to the rolls of Central (Surplus Staff) Cell in the Department of Personnel for further disposal including redeployment. The applicants and a number of other employees of the Beas Construction Board, were, accordingly, taken over on the rolls of Central (Surplus Staff) Cell w.e.f. 1-12-1984. Since no corresponding vacancies in the grade of Research Assistants were available in the Central Govt. Departments at the time the employees in question were rendered surplus, the Department of Personnel decided to redeploy them in other available posts under the Central Govt. and the pay scale offered was fixed in consultation with the Ministry of Finance. Accordingly, they were given the pay scale of Rs. 330-560, which is applicable to the graduates in the Central Government working as Upper Division Clerks. Since the applicants were redeployed at Chandigarh in the appropriate posts, in accordance with the provisions of the scheme for Redeployment of Surplus Staff, they should have no legitimate grievance against the Department. The applicants have requested, by way of relief, the grant of pay scale of Rs. 425-800, which is the scale for the post of Inspector in the Central Excise Department. Since this scale is above the post of U.D.C. held by the applicants, their demand for the



**V. S. Bhir****Member****Central Admn. Tribunal**

er scale is untenable. Incidentally, seen that the adoption of Central scale of Rs. 330-260 to the Beas Construction Board employees drawing scale of Rs. 570-1080 was decided prior concurrence of the Chairman, Construction Board, by the Central Government, vide Annexure R-1 dated 6th March, 1985.

5. The learned Counsel for the respondents has cited, in this case, the Supreme Court decision dated 15-4-1982 in the case of K. Rajendran and others v. State of Tamil Nadu and others, in which it was held that in case of abolition of Government post the question of giving an alternative employment to rehabilitate the employees affected, is a matter of policy for the Government, and the Court is not competent to give relief in that regard. In fact, the learned Counsel argued that, if the alternative post were not offered to the applicants by the Department of Personnel, they would have been without any job at the completion of the Beas Construction Project. Further, the applicant has been offered comparable scale of Rs. 330-560 applicable to the graduates

working in the Central Government and there is no cast for giving higher pay scale to them.

6. We agree with the learned Counsel for the respondents that the pay scale offered to the applicants under the Central Government of Rs. 330-560 needs no upward revision, as claimed by the applicants.

7. In view of the foregoing discussion, we find no merit in the applications. However, we would appreciate if the applicants, who have gained some expertise as Research Assistants in technical matters during their service with the Beas Construction Board, could be better redeployed in some technical posts under Central Government dealing with similar subjects like Irrigation and Power (e. g. under Central Water Commission, Central Electricity Authority, etc.) in due course, so that the employees' expertise could be made better use of.

8. The applications are thus dismissed with no order as to costs.

Amarjeet Chaudhary, J. M. I. agree.

Petition dismissed



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**S. G. Dodakale Gowda**  
**Judge**  
**Karnataka High Court**

### OBSERVATION

**Scheduled Castes and Scheduled Tribes Orders Act, 1976—Office Memorandum dated 14-12-78 —Petitioner produced a certificate issued by Tahsildar stating him to belong to 'Beda Jangam' Caste which is scheduled Caste—Respondent before appointing him against reserved quota asked him to give better particulars to the effect that he belongs to 'Beda Jangam' Caste and not 'Jangama' Caste which is not a scheduled Caste—Whether insistence for better particulars as such by the appointing authority before appointment is justified and valid—(Yes).**

### OBSERVED BY

**Mr. S. G. Dodakale Gowda**  
**Hon'ble Judge, Karnataka High Court**

### IN

**W.P. No. 13983 of 1978, decided on 9th April, 1985, in the case of Siddappa, Petitioner v. The Karnataka Electricity Board and ors, Respondents.**

### IMPORTANT POINT

*Instance for better particulars of caste by the appointing authority before giving appointment against reserved quota is justified and valid.*

### TEXT

S. G. Dodakale Gowda, J. Petitioner an applicant for recruitments as Assistant Engineer in the establishment of Karnataka Electricity Board first respondent. In order to claim benefit of reservation made in favour of Scheduled Caste and Scheduled Tribes, he produced a certificate issued by Tahsildar, Kortagere, Kortagere Taluak, to the effect that he belonged to Beda Jangam (S.C.) recognised as Scheduled caste. Both Selection Authority and Appointing authority insisted for production of better particulars to establish that he belonged to Beda Jangam community. In that process, a good deal of correspondence has taken place between peti-

tioner and respondents; petitioner asserting that he belongs to Beda Jangam while respondents insisting for better particular before taking him to service.

2. Being unsuccessful to get an order of posting, he has approached this Court to declare paragraph-2 of endorsement dated 18-11-1978 marked as Annexure-E and that portion of the Official Memorandum dated 4-12-1978 (Annexure-F) in so far as it has insisted production of better particulars of his caste as illegal and arbitrary and to issue a writ in the nature of mandamus directing respondents to take him to duty without insisting for production of fresh caste



certificate or better particulars.

3. Scheduled Castes and Scheduled Tribes Orders Act 1976 (Act. No. 108 of 1976) while amending Scheduled Castes, Order of 1950 issued by the President under Article 311 of the Constitution of India treated "Beda Jangam: Budga Jangam" as scheduled caste, listed at Sl. No. 19 in enumeration of various castes considered as Scheduled Caste in Karnataka. In furtherance of this object, Commissioner and Secretary to Government Social Welfare and Labour Department has issued a Circular' which reads thus:

"The Scheduled Castes and Scheduled Tribes Orders (Amendment) Act, 1976 has come into force with effect from 27th July 1977 by the Government of India Notification No. BC-12016/34/76-SCT-V, dated 27th July 1977. According to the said Act the Caste 'Beda Jangam', Budga Jangam' is indicated at Sl. No. 19 in the list of Scheduled Castes.

2. A Clarification is sought whether the people belonging to Jangam, a sub-caste of the Lingayath (Veerashaiva) "Community, could claim the concession and facilities afforded to the 'Beda Jangam' and Budga Jangam' caste declared as Scheduled Caste under the aforesaid Act.

3. It is also brought to the notice of the Government that the Officers authorised to issue caste certificates are giving caste certificates to the persons belonging to 'Jangama' as belonging to Scheduled Caste which in fact is not a Scheduled Caste in accordance with the said Act.

4. With a view to prevent irregularity in the issue of Caste Certificates to persons other than those Scheduled in

the above Act, Government direct that the Officers empowered to administer oaths and affirmations for purposes of affidavits and the Officers authorised to issue Caste Certificates should carefully verify the Castes and Tribes enumerated in the list of S. Cs, and S. Ts., in the Act and ensure that the claimants really belong to the particular Caste and Tribes mentioned in the Act.

5. It is also clarified that the Caste 'Jangama' which is a sub-caste of the Lingayath (Veerashaiva) community is not a caste declared as Scheduled Caste in the said Act. It is further clarified that the Beda or Budga Jangama' is not a section of Lingayaths or Veerashaivas.

6. All the Officers concerned are required to follow scrupulously the above instructions failing which serious notice will be taken against the erring officers".

4. According to this Circular, Jangama is not the same as 'Beda Jangam' treated as Scheduled Caste but 'Jangama' is a sub-caste of Ueerashiva or Lingayah community. State having noticed that persons authorised to issue caste certificates are indiscreetly issuing certificates without noticing the difference that exists between 'Beda Jangama' and 'Jangama' thereby persons who are not eligible to avail of the benefit of reservation are claiming the benefit denying privilege of persons really belonging to that caste, has issued certain guide lines, particulars of which are required to be verified before issuing a certificate. 'Beda Jangam' caste is considered as Scheduled caste by amended Act but not 'Jangama'. State Government



S. G. Dodakale Gowda

Judge

Karnataka High Court

ilar with existence of various castes, sects and sub-castes in Karnataka by Circular dated 22nd July, 1978 issued clarification to both Authorising Authorities to satisfy themselves in reference to particulars set out therein as to whether a candidate really belongs to 'Beda Jangam', a caste treated as Scheduled Caste mentioned in the Scheduled Caste Act or belongs to 'Jangama', a sub-caste or sect of Lingayath or Veerashaiva community in order to prevent commission of fraud in securing appointment or admission, on the guise that 'Jangam' caste is also treated as Scheduled Caste. It is in pursuance of the Circular, the Chief Engineer, Electricity Board has issued impugned endorsement dated 18-11-1978 (Annexure-E) requiring upon him to obtain a fresh certificate from Revenue Authorities indicating that he is a person belonging to Beda Jangam but not Jangame in sub caste of Lingayath community. By official memorandum dated 4-12-1978, the Chief Engineer has informed, in case of failure to produce this certificate, or

if it is revealed later on that a certificate produced is not genuine or false, appointment would be cancelled. If petitioner had produced required certificates there would not have been any necessity for the petitioner to approach this Court to seek relief in this form. One other salient factor to be noticed is nowhere in this petition, it is asserted that he does not belong to sub-caste or sect or Lingayath or Veerashaiva community but belongs to 'Beda Jangam' caste which is considered as Scheduled Caste. It is for the appointing authority to satisfy itself whether a candidate belongs to Scheduled Caste or otherwise and not for this Court to state what procedure it should adopt, for being satisfied itself about the caste of a candidate before issuing an appointment order. Impugned endorsement being in conformity with the circular of the Government which in turn intends to achieve constitutional mandate does not call for interference.

5. No merit. Writ petition is dismissed, but without costs. Rule discharged.



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**M. Rama Jois**  
**Judge**  
**Karnataka High Court**

### **OBSERVATION**

(i) **Industrial Disputes Act 1947—Sec. 33(2)(b)—Application for approval of dismissal—Finding of tribunal that enquiry officer was not appointed by a competent person—Enquiry officer appeared as witness and filed true-copy of the order—No suggestion in his cross examination that the same was manipulated—Workman also did not state that the same was not genuine—Order in question was issued on behalf of Administration—Whether the finding of Tribunal is such is perverse—(Yes).**

(ii) **Domestic enquiry—No appointment of the Presenting officer in the effect—Whether the enquiry is vitiated—(No).**

(iii) **Domestic enquiry—No appointment of the Presenting officer in the effect—Whether the enquiry is vitiated for playing the role of prosecutor by the Enquiry officer.**

(iv) **Domestic enquiry—Natural justice—Explaining of charge sheet not by enquiry officer but by defence Assistant of the charged officer Effect—Whether it vitiates the enquiry (No).**

### **OBSERVED BY**

**Mr. M. Rama Jois**  
**Hon'ble Judges, Karnataka High Court**

### **IN**

**W.P. No. 8738 of 1984, decided on 17th January, 1986, in the case of M/s. Bharat Electronics Petitioner Versus Sri K. Kasi and another, Respondents.**

### **IMPORTANT POINTS**

*The mere fact that the Presenting officer was not appointed is no ground to set aside the enquiry.*

### **TEXT**

M. Rama Jois, J. This writ petition by M/s. Bharat Electronics questioning the legality of the order made by the Industrial Tribunal, Bangalore, rejecting its application made under Section 33(2) (b) of the Industrial Disputes Act, 1947 (the Act for short), seeking approval for the order by which the first respondent was dismissed from service.

2. The facts of the case, in brief, are as follows : The first respondent was an employee in the service of the petitioner. Disciplinary proceedings were instituted against him by the issue of charge sheet dated 18-10-1979 (Annexure-A). It reads:

**“CONFIDENTIAL**  
**BHARAT ELECTRONICS**  
**LIMITED**



**JALAHALLI P. O., BANGALORE-13**

No 03142/DIV-I/PD

Date 18th

Oct, 1979

**CHARGE-SHEET**

and further action will be taken on the basis.

Sd/- B.N. Seshadri

18-10-79

Deputy General Manager  
 LPE."

For reasons stated infra, Shri K.Kasi, Staff No. 031242 is called upon to furnish his explanation within four days of receipt of this communication as to why disciplinary action should not be taken against him.

**REASONS :**

On 18-10-1979 at about 8.45 a. m. in the Electroplating shop of LPE Division he approached Sri K.M. Srinivasan, Deputy Manager, Finishing/LPE with a shop order and asked him in a defiant manner for some clarification. When the Deputy Manager asked him to approach the Foreman and stated that, if necessary, he will look himself to take into the matter, he (Shri Kasi) angrily spat on his face and assaulted him by hitting him on the neck and showered derogatory abuses in plenty.

His above mentioned acts during working hours in the factory premises constitute grave mis-conduct under company's standing orders 15(1)(h) and 15(1)v.

Pending submission of explanation and enquiry into the matter he is placed under suspension without wages with immediate effect.

If no explanation is received within the stipulated time it will be presumed that he has no explanation to offer but admits the charges levelled against him

The petitioner submitted his reply denying the charges. Thereafter, one K.G. Thimmappa was appointed as the Inquiring Authority. He held the inquiry. He recorded a finding to the effect that the first respondent was guilty of the charges. Thereafter, the disciplinary authority accepted the Inquiry Report and issued a show cause notice to the first respondent. After considering the reply furnished by the first respondent, final order dated 11th May 1981 (Annexure-G) imposing the penalty of dismissal from service was passed. Relevant portion of the order read :

"I have gone through carefully the enquiry proceedings and the findings of the Enquiry Officer in the case of Sri K. Kasi, Staff No. 031242, HSM-I, Electroplating/Fabrication/IPE. I concur with the findings of the Enquiry Officer who has found Sri Kasi guilty of the charges of approaching Sri K. M. Srinivasan, Deputy Manager, Finishing/LPE in defiant manner, spitting on his face and assaulting him.

"I have also considered carefully the explanation dated 11-3-1981 offered by Sri Kasi in reply to the show cause notice served on him. I have not found any case that may deserve review of the punishment



**M. Rama Jois**  
**Judge**  
**Karnataka High Court**

already proposed.

An act to assulting a superior officer right on the shop floor constitutes a serious misconduct and such an act tends to undermine the discipline on the shop floor, as well as smooth functioning of the factory.

The charges proved against Sri Kasi at the enquiry being grave serious. I am not inclined to view the case leniently,

I have gone through his past records of service. I have not found any extenuating circumstances which may go to mitigate the seriousness of the charges.

I therefore hereby pass orders that Sri Kasi be dismissed from the service of the company and necessary legal formalities complied with."

As certain industrial disputes between the petitioner and the workmen were pending before the Industrial Tribunal, Bangalore, an application under Section 2) (b) of the Act was filed by the petitioner seeking approval of the Tribunal for the order of dismissal. Before the Tribunal, the first respondent raised a preliminary objection to the effect that the domestic inquiry held by the petitioner was invalid on the following grounds:

- (i) There was no order appointing the Inquiry Officer.
- (ii) There was no Presenting Officer and therefore the Inquiry

Officer himself acted as Prosecutor.

(iii) The Inquiry Officer was biased.

The Tribunal by its order dated 10th February, 1984 accepted the above pleas of the first respondent and held that the domestic inquiry held was in valid and permitted the petitioner to adduce evidence. Aggrieved by the said order, the petitioner has presented this petition.

3. Sri A. G. Holla, learned counsel for the petitioner, submitted that the impugned order of the Tribunal suffers from patent error of law in that the finding that the Inquiry Officer had not been appointed by the management was perverse and similarly the finding that the inquiry was vitiated just because Presenting Officer was not appointed was also perverse, and further the view that just because the Inquiry Officer had put some questions to the witnesses the inquiry stood vitiated was also patently untenable.

4. Sri Gopal Gowda, learned counsel for the first respondent-workman, however, contended that everyone of the findings recorded by the Industrial Tribunal was correct. He submitted that the appointment of K. G. Thimmappa as the inquiring Authority by the competent authority was not proved and that in the absence of the Presenting Officer the role played by the Inquiry Authority amounted to his acting as a Prosecutor and therefore the view taken by the Tribunal was correct.

5. The first contention of the peti-



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tioner is that the finding that the Inquiry Officer was not appointed by competent authority was untenable. As can be seen from the charge sheet dated 18-10-1979, the inquiry was initiated by the Deputy General Manager who is competent authority. It is not in dispute that K. G. Thimmappa, a Deputy manager in the service of the petitioner, conducted the inquiry. As the first respondent had raised before the Industrial Tribunal an objection to the effect that the said Thimmappa was not appointed as the Inquiring Authority, Sri K. C. Thimmappa was examined as a witness. In the course of the deposition, he stated thus :

"I am working as Deputy Manager, Industrial Relations in the applicant company, Ext A-1 is the copy of the charge sheet issued to the opponent. Ext A-2 is the copy of the standing order applicable to the opponent. Ext. A-3 copy of the explanation given by the opponent. Ext. A-4 is the communication of my appointment as the Enquiry Officer which is produced today. T. G. Rao is the Manager Personal and above him is that Chief Administrative Manager by name S. Subbarayan. M. N. Kesari is the General Manager for equipment. One N. N. Krishan was the Executive Director. The Chief Administrative Manager has passed the order appointing me to conduct this enquiry, it is counter-signed by the General Manager, Equipment and Executive Director.

Ext. P. 5 is the copy of the order which has been compared to originals. The Enquiry proceedings are produced at Ext. A-6. It is at page 8 to 69 of the Enquiry papers produced."

(under lining by me)

In the course of his deposition he produced the communication addressed to him asking him to conduct the inquiry. The communication read :

"Personal Department  
 (Division I)

No. 031242/Div. I/pd

Date 22nd Oct. 1979

Sub : Disciplinary action against  
 Sri K. Kasi, Staff No. 031242  
 HSM-I, Electroplating/LPE

Ref : Charge-sheet-cum-suspension  
 Order No. 031242/Div. I/PD  
 dt. 18-10-79

It has been decided by the management to refer the above case to you for holding an enquiry into the charges levelled against Sri K. Kasi, Staff No. 031242 and submitting an early report. The relevant file concerning the matter is sent herewith.

Sd/-

D/c Manager. P & IR,

The above document clearly shows that K. G. Thimmappa was appointed as the Inquiring Authority. The Tribunal, however, held that as Ext. A-3, produced before the Tribunal, was only a true copy, the contention of the first respondent that K. G. Thimmappa was not appointed as the Inquiring Authority had to be accepted. Relevant portion of the reasoning of the Tribunal read :



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"It is contended for the workman that AW-1 Sri K. G. Thimmappa was not appointed as the Enquiry Officer and that the document Ext. A-4 and A-5 have been subsequently prepared by the management to make believe that AW-1 was regularly appointed as Enquiry Officer. Ext. A-5 only a true copy of the consent Note. No. 26 of the concerned file. There has been no explanation as to why the management has not produced the original file itself. Ext. A-4 is signed by the in-charge Manager. The person who was acting as Incharge Manager has not been examined. It has not been explained as to how the officer who has signed Ext. A-4 was the competent authority as on 22-10-79. There is no explanation as to why a copy of Ext. A-4 was not sent to the workman to give him notice that AW-1 Shri Thimmappa was appointed as the Enquiry Officer. Ext. A-1 is the charge-sheet dated 18-10-79. Ext. A-3 is the explanation given by the workman on 22-10-79. The management has not produced the original of Ext. A-3. Ext. A-3 is only a copy of the explanation given by the workman. In the absense of original documents of Exts. A-3 and A-5 it is difficult to believe that Ext. A-4 has been issued on 22-12-79. I am therefore of the view that the management has failed to prove that AW-1 Shri Thimmappa was regularly appointed as an Enquiry Officer before he issued the

notice of enquiry and commenced the enquiry."

As seen earlier, the institution of the disciplinary proceedings against the first respondent by the management by the issue of chargesheet dated 18-12-1979, extracted earlier, was not disputed that the final order imposing the penalty of dismissal was passed by the Deputy General Manager on 11-5-1981. There was no suggestion in the cross-examination to the Inquiry Officer that the true copy of the letter addressed to him nominating him as the Inquiring Authority, which he produced before the Tribunal, was a fabricated one. The workman himself gave his evidence on 21-12-1983, which is found at pages 123 and 124 of the writ petition, subsequent to the evidence given by K. G. Thimmappa on 21-1-1983. The workman did not state that the documents produced by the Inquiry Officer in the course of his evidence were not genuine. In the circumstances, it appears to me that the view taken by the Tribunal that the Inquiry Officer was not appointed by competent authority is perverse. It is not the case of the first respondent that the original of the latter by which Sri Thimmappa was appointed as Inquiring Authority was summoned, but was not produced. When the production of the true copy of the letter appointing Sri Thimmappa as the inquiry authority was not objected to and no suggestion was made in the cross-examination that it was not genuine and no statement was made by the first respondent in the



course of his evidence that the letter of appointment was not genuine, there was absolutely no reason for the Tribunal to accept the argument that the Inquiry Officer was not appointed by the competent authority and that A-4 was not genuine.

6. The Tribunal in its order stated that the letter by which Shri Thimmappa was nominated as the Inquiring authority was signed by incharge Manager. As can be seen from the content of the letter, extracted earlier, the incharge Manager did not state that he had appointed the Inquiring Authority, but had clearly stated that the management had decided to appoint Sri Thimmappa as the Inquiring Authority. Therefore, I am convinced that the finding recorded by the Tribunal that the appointment of Inquiry Officer was not by the competent authority is perverse and cannot be sustained.

7. In this behalf, it is also necessary to observe that in the absence of any statutory provision, the holding of disciplinary proceedings against an employee is purely a managerial function and therefore even if an order has been made on behalf of the management by an authority who is not competent under the Rules which have no statutory force, the same cannot be regarded as invalid. (See : Krishna Mohan v. Secretary and Treasurer, State Bank of India 1983 (1) SLR 792 In fact, in the present case both initiation of disciplinary proceedings and passing of the final order has been made by the competent authority. The every fact that

the competent authority has accepted the report submitted by Sri Thimmappa and issued a show cause notice to the first respondent and passed the final order shows that the Inquiring Authority had been appointed by the management.

8. One other ground on which the domestic inquiry held invalid was that Presenting Officer was not appointed. This view of the Tribunal is also patently untenable. There is no legal compulsion that Presenting Officer should be appointed. Therefore, the mere fact that the Presenting Officer was not appointed is no ground to set aside the inquiry (See : Gopalakrishna Reddy v. State of Karnataka), 1980 (1) ILR 575. It is true that in the absence of Presenting Officer if the Inquiring Authority plays the role of the Presenting Officer the inquiry would be invalid and this aspect arises out of the next point raised for the petitioner, which I shall consider immediately hereafter.

9. The third ground on which the Industrial Tribunal held that the domestic inquiry was invalid was that the Inquiry Officer had played the role of the Presenting Officer. The relevant part of the findings read :

“The learned counsel for the workman further contended that the questions put by the Enquiry Officer to the management’s witnesses themselves suggest that he was biased and prejudiced against the workman. There has been no explanation as to why no Presenting



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Officer was appointed and as to why the Enquiry Officer took upon himself the burden of putting questions to the management witnesses. The enquiry proceedings at Ext. A-6 disclose that after the cross-examination of the management's witnesses by the defence the Enquiry Officer has further put certain questions by way of explanation, but from their nature an inference arises that they are directed to fill in the lacuna. The learned counsel for the management contended that the Enquiry Officer has followed the principles of natural justice and that the domestic enquiry is quite valid. I am of the view that the fact that the Enquiry Officer has himself taken up the role of the Presenting Officer for the management goes to the root of the matter and vitiates the enquiry."

As far as position in law is concerned, it is common ground that if the Inquiring Authority plays the role of a Prosecutor and cross-examines defence witnesses or puts leading questions to the prosecution witnesses clearly exposing a biased state of mind, the inquiry would be opposed to principles of natural justice. But the question for consideration in this case is: Whether the Enquiry Officer did so? It is also settled that an Inquiring Authority is entitled to put questions to the witnesses for clarification wherever it becomes necessary and so long the delinquent employee is permitted to cross-examine the witnesses after the Inquiring Authority

questions the witnesses in the inquiry proceedings cannot be impeached as unfair. (See : Moolchandani Electrical and Radio Industries v. Workmen AIR 1975 SC 2125.

10. It may be seen from the order of the Tribunal that the Tribunal does not point out to any particular question or questions put by the Inquiring Authority to the witnesses which could be regarded as objectionable and exposing a state of biased mind on the part of the Inquiring Authority. Except making a bald statement that the questions put by the Inquiring Authority were such which would give rise to an inference that they were directed to fill in the lacuna and therefore there was violation of principles of natural justice, the particular questions put by the Inquiring Authority which led to such inference has not been pointed out. The Tribunal could not have set aside the domestic inquiry on the ground that the inquiring Authority played the role of the Presenting Officer without expressly referring to the questions put by the Inquiring Authority and indicating as to why it should be held that the Inquiring Authority played the role of the Presenting Officer and that the questions put were not by way of seeking clarification which he was entitled to do. For these reasons, it appears to me that the third point urged for the learned counsel for the petitioner has to be accepted and as the Tribunal has not considered the question with reference to the actual questions put by the Inquiring Authority, the matter has to be remit-



ted to the Industrial Tribunal for reconsideration of the question in the light of this order.

11. In the order of the Tribunal one other ground on which the Tribunal considered that there was violation of rules of natural justice was, that the Inquiry Officer did not explain to the first respondent the charge sheet and that copies of the documents relied upon by the management was not given to him. There is no reference to any particular document which is not given to the first respondent. As far as the ground that the charge sheet was not explained to the first respondent is concerned, it may be seen from the deposition of the first respondent that he was assisted by the Vice President of the Union S. Arangel and that he had explained the charge-sheet to the first respondent and thereafter the first respondent gave the explanation. The relevant portion of the deposition reads :

"1. I have attended the enquiry conducted by Sri K.G. Thimmappa. He did not explain the procedure of enquiry. The charge sheet was not explained to me. I have given my explanation to the charge sheet. Our Trade Union Leader read the charge sheet and after understanding the same, my explanation was given. 2.

Mr. S. Arangel was my representative in the enquiry. He is the Vice President of our Union. He knows English.

Myself and my representative were present on each date of enquiry. I have signed on all the pages of Enquiry Proceedings. On my behalf Mr. Arangel has cross examined the management witnesses."

(Underlining by me)

In the face of the above deposition, the finding recorded by the Labour Court that the inquiry was vitiated because the charge sheet was not explained to the first respondent is again perverse.

12. In the result, I make the following order :

(i) Rule made absolute

(ii) The impugned order of the Industrial Tribunal dated 10-2-1984 Annexure-K. is set aside.

(iii) The matter is remitted to the Industrial Tribunal, Bangalore, for considering only the question as to whether the Inquiring Authority had put questions to the witnesses as would give a valid basis for an inference that he also acted as a Presenting Officer and on the said ground the inquiry stood vitiated. The Tribunal is directed to dispose of the case most expeditiously.



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**Judge**  
**Karnataka High Court**

### OBSERVATION

(i) **Misconduct—Standing order 25 (19) making gambling and money lending as misconduct—Whether the acts of gambling money lending together constitutes misconduct—(No)—Each of the acts i.e. gambling or money lending can be regarded as misconduct**

(ii) **Misconduct—Money lending by employee within the premises of petitioner company—Whether in order to constitute the same as such it should be regular business—(No).**

(iii) **Misconduct—Standing order 25(19) making money lending as the—Whether an employee found receiving the money lent is guilty of misconduct as such—(Yes)**

(iv) **Misconduct Finding regarding in the enquiry—Based on the basis of admission of the charged official—Validity of—It is valid.**

(v) **Money lending on premises of establishment—Single instance of the—constitute misconduct—Yes.**

(vi) **Industrial Disputes Act, 1947—Section 33(2)(b)—Permission to dismiss an employee during the pendency of Industrial Dispute—Application for the misconduct found proved—Tribunal/High Court is helpless to interfere with the quantum of penalty even if they are convinced that the punishment is excessive.**

### OBSERVED BY

**Mr. M. Rama Jois**  
**Hon'ble Judge, Karnataka High Court**

### IN

W.P. No. 6514 of 1985, decided on 17th January, 1986, in the case of Hindustan Aeronautics, Petitioner Versus B. Gulab Singh and others, Respondents.

### IMPORTANT POINT

- (i) *Finding based on the admission in enquiry is valid.*
- (ii) *In order to constitute misconduct on the basis of money lending it is not necessary that it should have been the regular business of the concerned person. A single instance of the same is sufficient to constitute misconduct.*

### TEXT

M. Rama Jois, J.—The management of Hindustan Aeronautics Limited, has presented this petition praying for

quashing the order of the Industrial Tribunal, Bangalore, rejecting the application of the petitioner made under



Section 33 (2) (b) of The Industrial Disputes Act ('the Act' for short) seeking approval for the dismissal from service of the first respondent.

2. The facts of the case, in brief, are as follows : Respondent No. 1 was a workman in the service of the petitioner. Disciplinary proceedings were instituted against him with the issue of the charge sheet dated 17-9-1981. It reads :

"Sub :- Charge sheet.

Ref : Suspension Order No. A/A/PC-III 200/254/81 dated 10-9-1981.

Sl. No. Name and B. No.

1. R. Kankasabapathy
2. Venkatappa
3. T.N. Iswara
4. S. Muniswamy
5. D.N. Gangadhara
6. K.S. Poovaiah
7. Mohammed Ishaq
8. D.R. Swamy
9. V.S. Kannan

Amount

- |               |           |
|---------------|-----------|
| 1329/51923-95 | Rs. 75/-  |
| „ 55471-39    | Rs. 40/-  |
| „ 55733-29    | Rs. 110/- |
| „ 55774-67    | Rs. 130/- |
| „ 56367-67    | Rs. 22/-  |
| „ 55494-67    | Rs. 165/- |
| „ 56115-47    | Rs. 120/- |
| „ 41345-28    | Rs. 50/-  |
| „ 55760-45    | Rs. 70/-  |

Rs. 782/-

The amount of money collected by you from each of the abovementioned employees is as shown against their names.

2. You were then taken to the Vigilance Office where the following documents along with Rs. 1106/- i. e. Rs. 295/- and Rs. 782/- and Rs. 29/- which you on your person when you entered factory where seized under mahazar.

1. Your pay cover for the month of August 1981;

During the month of August 1981 you were posted to work in the second shift 16.15 hours to 0015 hours. On 31-8-1981 which was a salary disbursement day, you entered the factory at about 9.15 a.m. and drew Rs. 295/- of your salary. At about 10.30 a.m. on the same day, you went to Drop Tank Shop and were seen by Vigilance Guard collecting your dues together with interest towards the money you had lent in the department to the following employees of your departments.

2. Employee Gate Pass dated 31-8-1981 authorising you to go out after drawing your salary.

The sum of Rs. 295/- which was your salary for the month of August was returned to you at that same time after obtaining your acknowledgement of the mahazar.

3. You were thus indulging in money lending to employees within the company premises.

4. The above constitute sets of misconducts under the following clauses



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of standing orders :

Clauses 25 (19) "Gambling, money lending or doing any other private business within the company's premises.

Clause 25 (8) : Breach of standing orders or rules or any law applicable to the establishment.

5. You are therefore called upon to submit your explanation in writing on or before as to why disciplinary action should not be taken against you. In case no explanation is received within the stipulated period, it will be presumed that you have no explanation to offer and further action as deemed fit will be taken against you."

In his reply to the charge sheet vide Annexure-B dated 29-9-1981, the first respondent did not dispute the allegations levelled against him. Thereafter an inquiry was held by the Inquiring Authority nominated by the petitioner. In the course of the inquiry also, the first respondent pleaded for a lenient treatment. The Inquiring Authority held that the first respondent was guilty of the charge framed against him. Final show-cause notice was also issued to the first respondent proposing to impose the penalty of dismissal from service. Again in his reply dated 2-11-1981 (Annexure-F) the first respondent did not dispute the findings recorded against him, but, pleaded for mercy. The management, however, proceeded to impose the penalty of dismissal from service. As certain industrial dispute between the petitioner and their workmen with which the first respondent was connec-

ted was pending before the Industrial Tribunal the petitioner made an application under Section 33 (2) (b) of the Act seeking its approval for the order by which penalty of dismissal from service was imposed against the first respondent. A preliminary objection was raised by the first respondent to the effect that the domestic inquiry was defective. This plea of the first respondent was rejected by the Industrial Tribunal by its order dated 25-1-1984 (Annexure-K). However, by final order dated 28-1-1985, the Tribunal held that the first respondent had not indulged in money lending transaction and therefore he was not guilty of the charge. Aggrieved by the said order, the petitioner has presented this petition.

3. Sri H.B. Datar, learned counsel appearing for the petitioner, submitted that the impugned order of the Industrial Tribunal suffered from patent error of law, in that, for the reason that not only for the reason that the Tribunal had failed to notice that in all the statements made before the Inquiring Authority the first respondent has admitted his guilt and that was one of the grounds on which the domestic inquiry was held valid, but also for the reason that in the face of the glaring facts about the first respondent indulging in money lending, the Tribunal recorded a finding that he was only collecting money which he has given as hand loan and not in the course of money lending business.

4. Sri S. Krishnaiah, learned counsel appearing for the first respondent



submitted as follows : According to the standing order the acts complained of against the first respondent did not constitute a misconduct. The mere fact that the first respondent had lent money during the period of strike to his co-workmen when they were in difficulties and collected repayment within the factory premises constitute no misconduct within the meaning of the standing orders. As held by the Supreme Court in the case of *Sarnuggur Jute Factory Ltd v. Workmen* 1964-1 LLJ 634. collecting repayment voluntarily made by another workman to whom money had been lent to meet his personal needs cannot by any stretch of imagination can be regarded as misconduct and therefore in the present case the view taken by the Industrial Tribunal is in accordance with law.

5. Elaborating the submission that the acts complained of against the first respondent did not amount to misconduct, learned counsel submitted that the following two ingredients were essential to constitute misconduct :

- (i) A workmen should have indulged in both gambling and money lending and the money lending must be habitual and in the nature of a regular business.
- (ii) Money lending must be within the factory premises. Mere collecting repayment of money lent outside does not constitute money lending.

In order to appreciate the conten-

tion, it is necessary to set out the relevant clause of the standing orders. Clause 25 (19) of the standing order reads :

“25 (19) : Gambling, and money lending or doing any other private business within the company's premises.”

Learned counsel pointed out that the acts of gambling and money lending together constitutes misconduct and as there was no allegation of gambling against the first respondent, no charge of mis-conduct could have been framed against the first respondent within the scope of the above standing order. I see no merit in this submission. It is true that the word ‘and’ is used between the words ‘Gambling’ and ‘money lending’. In the context each of the acts, i e. gambling or money lending is to be regarded as misconduct and the word ‘and’ in the context can only be understood as ‘of’. It is difficult to accept the interpretation placed on the standing order by the learned counsel for the first respondent that the standing order is intended to make the act of Gambling together with money lending alone a misconduct.

6. Similarly the contention of the first respondent that money lending, in order to constitute misconduct should be a regular business is also untenable. In the standing order, three misconducts are specified namely,

- (i) Gambling,
- (ii) Money lending,
- (iii) Doing any other private business.



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If anyone of these acts are committed by any workman within the company's premises, he commits misconduct. In other words, indulging in gambling or money lending outside the factory premises does not constitute misconduct within clause 25 (19) of the certified standing orders. Therefore, if a workman indulges in money lending within the company's premises, it constitutes misconduct within the meaning of clause 25 (19).

7. The next limb of the submission made by the learned counsel for the first respondent was that even according to the finding stated in the charge-sheet, the first respondent only collected money which he had lent to several workmen outside the factory and therefore the charge on the face of it fails for the reason that the money was not lent within the factory premises. According to the learned counsel, receiving repayment of money lent within the factory premises constitutes misconduct for the reason, it is only money lending which falls within the scope of clause 25 (19) of the Standing Orders and not receiving the money lent. The above submission of the learned counsel is also fallacious. Money lending transaction includes both giving the money on loan to a person and receiving repayment of the money so lent from such person, i.e., the debtor. Therefore, the act of giving money as loan to another person and also collecting repayment both fall within the expression 'money lending'. Admittedly the first respondent had lent money to a number of workmen referred

to in the charge-sheet, on exorbitant interest and had collected repayment within the factory premises. Therefore, the submission that the first respondents had merely collected the money within the factory premises and it does not constitute misconduct within the meaning of clause 25 (19) of the standing order is untenable.

8. Learned counsel for the first respondent strenuously contended that it was necessary for the petitioner to have proved the misconduct in a regularly constituted inquiry, but in the present case though an inquiry had been instituted the finding was based on mere admission, though there was actually no such admission. Learned counsel submitted that the fact that the first respondent had admitted that he had collected repayment of certain amounts as specified in the charge-sheet and from persons specified therein was not sufficient to hold that the first respondent had admitted his guilt and therefore there was no ground to interfere with the order of the Industrial Tribunal.

9. As far as the position in law is concerned, there is no doubt that if a workman against whom disciplinary proceedings are instituted admits his guilt, there is no necessity for the management to hold any inquiry. This position is clear from the following two decisions:

1. Central Bank of India Limited v. Karunamoy Banerjee. 32 FJR p. 481.
2. The Associated Cement Company Ltd., v. Abdul Gaffar 1980



Lab I.C. 683.

10. The next question for consideration is whether the learned counsel for the first respondent is right in saying that he had not admitted the guilt. In order to reject the contention of the learned counsel for the first respondent as baseless, it is only necessary to refer to the relevant portions of the statement made by the first respondent before the Inquiring Authority. In his statement dated 29-9-1981, the first respondent stated as follows:

"Sir,

During the strike lockout period my friend was in trouble of finance and I had given him a hand loan of some amount. This is only on the friendship and humanitarian consideration that he was in distress and there is no one to help him. So I have given the amount for his immediate use. The part of this amount was collected by me on 31-8-1981 and unfortunately the vigilance has taken this issue as serious offence which I was not aware and I was caught by them thinking that it is mistake. I do hereby understand that without my knowledge I have done this mistake and I assure you that I will not commit such type of mistake in future. So I request you to kindly excuse me this time and revoke the suspension order for which act of kindness I shall be ever remain grateful to you Sir."

(Underlining by me)

Again before the Inquiring Authority, he stated thus;

"On 31-8-81 I came to factory at about 9.15 a.m. and drew Rs. 295/- as my salary. I admit that I collected Rs. 782/- from nine employees of Drop Tank Shop as stated in the charge sheet Exhibit P. 1 as dues together with interest towards the money that I lent to them during the strike period and later. I charged interest at the rate of 10% per month. At about 11 hours on 31-8-1981 I took gate pass to go to the Main Gate Vigilance personnel I was asked to come to the Vigilance Office where I was asked to produce the total amount I had with me. The total sum of Rs. 1106.00 which I had with me was seized under mahazar on which I signed. My statement was also taken. Rs. 295/- which was salary for the month of August was returned to me. Sri P. Dhanasekharan, officiating Deputy Manager, Drop. Tank Assy, Shop was also present.

I submit that I have committed this mistake unknowingly and I assure that I will not repeat in future. I request you to kindly excuse me for this lapse."

(Underlining by me)

Finally, in his reply to the show-cause notice, the first respondent stated thus:

"I beg to submit that at all stages I had accepted the guilty and I never proved myself as innocent of the charges. I had also submitted



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that I was not aware of the consequence of this deal and hence continued. I am a poor man having the responsibility of a big family, if I am thrown out as proposed, my whole family could be on streets for no fault of them, and my ignorance of the consequence would have on the street. As I have been sufficiently punished and had mental torture for all these days, I dare not commit any act of submissiveness of discipline in the factory with this assurance I beg your mercy and goodness to be kind enough to pardon me and not to impose on me this highest punishment of dismissal. I pray for your mercy and request you to kindly see my case sympathetically. Atleast in the interest of my innocent family members on whom this punishment proposed to be imposed will come very heavily as a death blow.

I therefore with all humbleness and reformed mental, would, pray your goodness for mercy and request for revoking the proposed punishment.

I further pray your goodness that any minor punishment which would meet the ends of justice may be imposed on me."

(Underlining by me)

I fail to see as to how the learned counsel for the first respondent could advance a contention before this Court that the first respondent had not admitted his guilt. In everyone of the statements, the

first respondent has admitted his guilt. In particular in the final statement, he accepted his guilt and requested the management to impose a minor penalty. Therefore, the submission made by the learned counsel for the first respondent is baseless.

11. It may also be seen that while rejecting the plea of the first respondent that the domestic inquiry held by the petitioner was invalid, the then Presiding Officer of the Industrial Sri B. N. Lage, in his order dated 25-1-1984 (Annexure-K) observed as follows:

"He has reiterated that on all the occasions he has accepted the guilt and since he was poor and ignorant he prays for mercy. In the first explanation Ext. A-4 before the Enquiry Officer as per Ext. A-7 and in the final explanation Ext. A-10 the workman concedes that he has indulged in money lending business within the premises of factory. I do not find that the Enquiry Officer and the Management had mis-represented or indulged in any other unbecoming acts in getting admission or concession from the workman. The order of dismissal Ext. A-11 cannot therefore be assailed.

14. The standing orders at Ext. A-12 show that as per Clause 25 (19) doing money lending in the factory premises is a misconduct and 25 (8) deals with the breach of any rules in the standing orders. The domestic inquiry held against the workman is valid and in accordance with law.



15. In the result, domestic inquiry held to be valid."

(Underlining by me)

In the face of the above order, it appears to me that the order that could have been passed by the Industrial Tribunal was to grant the application made by the petitioner, but nevertheless Sri R. Ramakrishnan, the present Presiding Officer of the Industrial Tribunal, completely over looked the pleading of guilt by the first respondent as also finding to that effect in the order of the Predecessor and proceeded to hold that the collecting of money lent outside the factory did not amount to his misconduct on the ground that it was not in the nature of money lending business without noticing what is misconduct under the standing order is act of money lending and not money lending business.

12. Learned counsel for the respondent, however, submitted that the view taken by the Tribunal was correct and in support of the submission relied on the judgement of the Supreme Court in *Remington Rand of India v. Tahar Ali* ILR 1984-2 Kar 777, in which the Supreme Court held that the act of the workman concerned in selling and servicing a single typewriter did not amount to misconduct of doing the business of selling and/or repairing typewriters. The decision is not apposite to this case. As pointed out earlier, under the Standing Order 23 (19) what is misconduct is money lending within the factory premises. When money lending is regarded as misconduct under the standing

order, even a single transaction of money lending would amount to misconduct as is clear from the judgement of the Supreme Court in the case of *Digwadh Colliery v. Ramji Singh*. In the said case, the Supreme Court held that when according to the standing orders money lending transaction with a subordinate employee amounted to misconduct, even a single transaction was sufficient to hold that the person was guilty of misconduct.

13. In the present case, the first respondent had lent money to as 9 persons and according to his statement made before the Inquiring Authority on 14-4-1985, extracted earlier, he had charged interest as 10 per cent per month, which amounts to 120 per cent per annum. He has also admitted in his statement dated 2nd November 1981 (Annexure-F) that not only he had lent money to several persons during the period of strike but he continued it subsequently as he was not aware of the consequences of the deal. In the face to these glaring facts and admissions, the view taken by the Tribunal that no misconduct was committed by the first respondent within the meaning of the standing order is patently untenable and perverse.

14. Whatever that may be, the quantum of penalty imposed appears to be excessive ; as pleaded by the first respondent. It is not in dispute that he had put in a little more than 20 years of loyal service and he had no antecedent bad record of service. I am convinced that, having due regard to more than



**M. Rama Jois**  
**Judge**  
**Karnataka High Court**

0 years of unblemished service put in by the first respondent, his repentance for his acts of money lending, his plea that he did so without fully understanding the implications of the standing order and his straight forward conduct in praying for imposing some minor penalty, the submission made by the learned counsel for the first respondent that the petitioner should not have proceeded to impose the extreme penalty of dismissal from service has great force, for, the disciplinary powers must be used to impose just punishment to a person who had acted unjustly.

15. Unfortunately for the first respondent, this is a proceeding arising out of Section 33 (2) (b) of the Act. If only the Legislature had incorporated a provision in Section 33 (2) (b) of the Act that a proceeding under this provision should be treated as a reference under Section 10 of the Industrial Disputes Act, as suggested by this Court in the case of *Workmen of Mysore Lamp Works v. State of Karnataka* it would have been possible for this Court to modify the penalty by invoking the provisions of Section 11-A of the Act. In the absence of any such provision, in a proceeding arising under Section 33 (2) (b) of the Act, the Labour Court/Industrial Tribunal as well as the High Court are helpless because they cannot interfere with the quantum of penalty even when they are convinced that the punishment is excessive. Even now it is a matter for serious consideration by the Government. It is true that

even after the application under Section 33 (2) (b) of the Act is granted, the first respondent can raise an industrial dispute and the Government is under an obligation to refer such dispute for adjudication at least regarding quantum of penalty in view of the decision reported in ILR 1984 (2) Kar 777. But that would delay the resolution of the dispute to the inconvenience and hardship of the workman as also of the management.

16. However, what has happened during the pendency of this petition is that at the instance of the trade union, a dispute concerning imposition of penalty of dismissal from service by the petitioner against several workmen has been referred for industrial adjudication and the dispute concerning the dismissal of first respondent happens to be one of them. Therefore, the first respondent is at liberty to take all such grounds as are available to him before the Labour Court, to which the dispute has already been referred for adjudication.

17. In the result, I make the following order :

- (i) Rule made absolute,
- (ii) The writ petition is allowed.
- (iii) The impugned order of the Industrial Tribunal dated 28-1-1985 (Annexure-L) is set aside.
- (iv) The Industrial Tribunal is directed to accord approval to the application of the petitioner for the order imposing the penalty of dismissal from service against the first respondent.
- (v) No Costs.



IT IS THE ESSENCE OF DEMOCRACY  
TO OBEY  
NO MASTER BUT THE LAW



**S. K. Mal Lodha**  
**Judge**  
**Rajasthan High Court**

### OBSERVATION

(i) **Industrial Disputes Act, 1947—Section 33 (2) (b)—Dismissal from service—Application to tribunal for approving the action as such—Conditions precedent to the—Petitioner dismissed from service on 12-7-1974 while application for approving the same was received on 2-11-1974 and payment of one month's wages was made on 17-7-1974 Tribunal refused to approve the same—Validity—Since the dismissal, payment of one month's wages and application for approval are not simultaneous, the refusal of Tribunal to approve the same is valid.**

(ii) **Industrial Disputes Act, 1947—Section 30 (5) - When it is attracted—It is attracted when there is a proper application in accordance with Section 33 (b) proviso.**

(iii) **Industrial Disputes Act, 1947—Section 33A—Provisions of the when invoked.**

### OBSERVED BY

Mr. Dwarka Prasad and  
 Mr. S. K. Mal Lodha  
 Hon'ble Judges, Rajasthan High Court

### IN

D. B. Civil writ Petition No. 1904 of 1976, decided on 19th December, 1984 in the case of Rajasthan State Road Transport Corporation and another Petitioners v. Judge, Industrial Tribunal—I Rajasthan Jaipur and another, Respondents.

### IMPORTANT POINT

*Where the dismissal, payment of one month's wages and application for approval of dismissal are not simultaneous and part of the same transaction the refusal by tribunal to grant such approval is valid.*

### TEXT

S. K. Mal Lodha, J. :— This writ petition has been referred to the Division Bench by one of us as it was contended that Associated Cement Companies Ltd. Lakheri Cement Work Lakheri v. Industrial Tribunal, Rajasthan, Jaipur and another, I.L.R. (1959) IX Raj. 102, which was followed in M/s Metal Works Ltd. v. H. R. Deb and other

A.I.R. 1962 Cal. 123, has been impliedly overruled by the decision of their Lordships of the Supreme Court in M/s Poddar Mills Ltd. v. Bhagwan Singh and another A.I.R. 1973 S.C. 2224.

2. A few facts leading to this writ petition may briefly be stated :

Respondent No. 2 Moolsingh was



appointed as conductor by the order dated August 25, 1970 of the Regional Manager, Jodhpur and was posted at Jodhpur Depot. On receipt of a report relating to misconduct, respondent No. 2 was charge sheeted by communication dated May 18, 1974 and Shri K. C. Sogani was appointed as Enquiry Officer. Respondent No. 2 submitted a reply. The Enquiry Officer submitted the report to the Regional Manager, Jodhpur who was the Appointing Authority. The Regional Manager, Jodhpur on the basis of the record of the domestic enquiry found that the charge of misconduct under clause 34 (i) of the Standing Orders of 1965 was duly proved against him. He, therefore, by his order dated July 12, 1974 dismissed respondent No. 2 under clause 36 (8) of the Standing Orders of 1965. That order was sent to the Depot Manager, Jodhpur with a direction that one month's wages without any deduction may be paid to him simultaneously by serving the order (Annexure-1). As the order (Annexure-1) of dismissal from service could not be served personally, it was sent by Depot Manager Jodhpur to respondent No. 2 by registered post and one month's wages were also sent by money order on July 17, 1974. An application under s. 33 (2) (b) of the Industrial Disputes Act (No. XIV of 1947) (for short 'the Act') for granting approval was sent to the Industrial Tribunal-1, Rajasthan, Jaipur by registered post. The approval application is dated July 17, 1974. It appears from the impugned order (Annexure-6) that application was received by the Tribunal thro-

ugh registered post on November 27, 1974. In reply to the application, respondent No. 2 inter alia, contended that the action of dismissal, payment of wages and filing of application for approval being not simultaneous, the application is liable to be rejected. The Judge, Industrial Tribunal-I, Rajasthan, Jaipur (respondent No. 1 declined to grant the approval whereby refusing the approval application vide order (Annexure-6) dated February 4, 1976 on the ground inordinate delay in filing it. The petitioners filed the writ petition for quashing the order (Annexure-6) dated February 4, 1976 and for a direction to respondent No. 1 for granting approval under s. 33 (2) (b) of the Act in respect of the order of dismissal from service of respondent No. 2. In the writ petition, it was averred that there was sufficient compliance of the proviso to s. 33 (2) (b) of the Act and respondent No. 1 was not right in law in refusing to grant the approval. The writ petition was contested on behalf of respondent No. 2 (workman). It was submitted that the application was rightly refused by respondent No. 1 as there was non-compliance of s. 33 (2) (b) of the Act.

We have heard Mr. R. N. Munshi, learned counsel for the petitioners and Mr. M. Mridul, learned counsel for respondent No. 2.

Mr. R. N. Munshi, learned counsel for the petitioners while assailing the order (Annexure-6) contended that dismissal, payment of one month's wages



**S. K. Mal Lodha**  
**Judge**  
**Rajasthan High Court**

and filing application under s. 33 (2) (b) of the Act for granting approval of dismissal need not be simultaneous and in the facts and circumstances of this case, there was sufficient compliance of the proviso to s. 33 (2) (b) of the Act. In support of that Mr. Munshi, learned counsel for the petitioner placed reliance on the Associated Cement Companies Ltd's case (supra). On the other hand, Mr. M. Mridul, learned counsel for respondent No. 2 strongly refused the submission made by Mr. R. N. Munshi, learned counsel for the petitioners and pressed for our considerations that the fulfilment of the conditions laid down in the proviso to s. 33 (2) (b) of the Act is mandatory and in the absence of the conditions being satisfied, the application cannot be said to be proper one before the Tribunal and so, the approval cannot be granted. He submitted that the view taken in the Associated Cement Companies Ltd's Case (supra) stands overruled by M/s. Poddar Mills Ltd's case (supra).

3. It will be useful here to notice the material part of s. 33 of the Act:

“S. 33 Conditions of service, etc, to remain unchanged under certain circumstances during pendency of proceeding,—(1).....  
(2) During the pendency of any such proceeding in respect of an industrial dispute, the employe may, in accordance with the Standing order applicable to a workman concerned in such dispute or, where there no such standing orders, in accordance with the terms of the

contract, whether express or implied, between him and the workman.

(a) alter, in regard to any matter not connected with the dispute, the conditions of service applicable to that workman immediately before the commencement of such proceeding; or

(b) for any misconduct not connected with the dispute, discharge or punish whether by dismissal or otherwise, that workman;

Provided that no such workman shall be discharged or dismissed unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer.

(3) .....

(4) .....

(5) Where an employer makes an application to a conciliation officer Board, an arbitrator a Labour Court, Tribunal or National Tribunal under the proviso to sub-section (2) for approval of the action taken by him, the authority concerned shall, without delay, hearing such application and pass “within a period of three months from the date of receipt of such application” such order in relation thereto as it deems fit.

Provided that where any such authority considers it necessary



or expedient so to do, it may for reasons to be recorded in writing extend such period by such further as it may think fit.

Provided further that no proceeding before any such authority shall lapse merely on ground that any period specified in this sub section had expired without such proceedings being completed.

Bhandari, J., as he then was, while interpreting sub-ss. (2) and (5) s. 33 of the Act in Associated Cement Companies Ltd's case (supra) observed as under :

"This object is achieved if the proviso is taken as laying down that the discharge or dismissal shall not be effective unless such workman had been paid wages for one month and an application has been made by the employer to the authority before which the dispute is pending for approval of action taken by the employer. This can be easily done by providing in the order of discharge or dismissal that it shall be operative from some future date. In the meantime, the employer may fulfil the duties cast upon him, that is may make payment of wages for one month and may also file an application for approval. This would carry out the requirements of the main section as well as the proviso. Instead of giving of the interpretation that the main section overrides the proviso or vice versa, it will be better to adopt the inter-

pretation given above. I may also observe that it is not very common to pass an order for discharge or dismissal which may be operative at some future date. The provision of law under consideration contemplates that the only legal order of discharge or dismissal which an employer is authorized to pass, is that it shall be operative at some future time thus affording the employer some breathing time to fulfil the requirements of the proviso."

He also considered the scope of enquiry under sub-s. (3) of s. 33 of the Act to be held on an application for approval of action taken by the employer in cases governing by s. 33 (2) (b) of the Act. According to the learned Judge, the scope of enquiry is limited to the determination of the question whether the misconduct alleged to have been committed by the workman is prima facie, proved and is of such a nature that prima facie, the employer was justified in awarding the punishment of dismissal or discharge and that in making its order, the Tribunal may prima facie examine the seriousness of the misconduct proved against the employee and may further examine that the employer is not acting malafide or is not resorting to any unfair practice or victimisation. The learned Judge was of the view that the Tribunal would not be justified in determining the question that the conditions laid down in the proviso to sub-s. (2) of s. 33 are not fulfilled by the employee. The



**S. K. Mal Lodha**  
**Judge**  
**Rajasthan High Court**

remedy of the employee is either by way of taking action under s. 31 for the criminal prosecution of the employer or also by making a complaint in writing in the prescribed manner to the appropriate authority as laid down in s. 33-A of the Act. Modi, J. while agreeing with the final order made by Handari, J., as he then was, while considering s. 33 (2) of the Act observed as under :

"I am, therefore, inclined to think that a construction should be placed on the proviso which would harmonise with the body of this section itself. It further seems to me that the requirements of s. 33 (2) would be satisfied substantially if in the category of cases provided for under s. 33 (2), an employer makes the payment of a month's wages or offers it to the employee and makes an application to the Industrial Tribunal, simultaneously with the action taken, or on the day following or even within a reasonable time of the action taken, where such a course may have become necessary so that the actual payment of wages or the application made for approval are not characterised by any unreasonable delay whatsoever."

The extent of the jurisdiction of the Tribunal while considering an application to approve order of dismissal passed against workman under s. 33 (2) (b) of the Act was examined in *L. K. Textile v. Its Workman* A.I.R. 1961 S.C. 60. Gajendragedkars J., as he then

was, with whom Wanchoo, J. as he then was agreed as observed as under :

"In view of the nature and extent of the enquiry permissible under s. 33 (2) (b) all that the authority can do in dealing with an employer's application is to consider whether a prima facie case for according approval is made out by him or not. If before dismissing an employee the employer has held a proper domestic enquiry and has proceeded to pass the impugned order as a result of the said enquiry, all that the authority can do is to enquire whether the conditions prescribed by s. 33 (2) (b) and the proviso are satisfied or not. Do the standing orders justify the order of dismissal? Has an enquiry been held as provided by the Standing Order? Have the wages for the month been paid as required the proviso?....."

(underlining is ours)

It was ruled in *Straw Board Mfg. Co. v. Govind* AIR 1962 S.C. 1500 that the proviso to S. 33 (3) (b) contemplates the three things mentioned therein, namely, (i) dismissal or discharge (ii) payment of wages ; and (iii) making of an application for application for approval, to be simultaneous and to be part of the same transaction, so that the employer when he takes the action under s. 33 (2) by dismissing or discharging an employee, should immediately pay him or offer to pay him wages for one month and also make an application to the Tribunal for approval at the same time. It will be useful here to



excerpt the following from Straw Board Mfg. Co. s. case (supra) :

"There can therefore, be no doubt that sub s. 2 (b) read together with the proviso contemplates that the employer may pass an order of dismissal or discharge before obtaining the approval of the action taken by him. It is however urged on behalf of the respondent that if the employer dismisses or discharges a workman and then applies for approval of the action taken and the Tribunal refuses to approve of the action the workman would be left with no remedy as there is no provision for reinstatement in s 33 (2) He, however, see no difficulty on this score. If the tribunal does not approve of the action taken by the employer the result would be that the action taken by him would fall and there-upon the workman would be deemed never to have been dismissed or discharged and would remain in the service of the employer. In such a case, specific provision as to reinstatement is necessary and by the very fact of the Tribunal not approving the action of the employer, the dismissal or discharge of the workman would be of no effect and the workman concerned would continue to be in service as if there never was any dismissal or discharge by the employer. In that sense the order of discharge or dismissal passed by the employer does not become final and conclusive

until it is approved by the tribunal under s. 33 (2).

The provisions of s 33A of the Act were also considered in the aforesaid decision in Metal Press Works Ltd's case (supra) was considered in the aforesaid decision wherein it was held :

"that payment of wages and the making of the application should be simultaneous with the order of discharge or dismissal. It has further been pointed out that the word 'simultaneously, must of course be taken reasonably and a notion of split-second timing should not be imparted. It should be done at once and without delay, and it will depend upon the facts of each case whether the application has been made at once or without delay."

In Poddar Mills's case (supra), the provisions of s. 33(2)(b) proviso came up for consideration. The question arose whether in the absence of any satisfactory proof as to payment of one month's wages to the dismissed employee, the approval can be granted or not? In that case, the workman were ordered to be dismissed with immediate effect on January 4, 1968. The approval application for the dismissal of the workman was made before the Tribunal on January 25, 1968 and one month's wages as required under the Act were given to the workman only on February 2, 1968. Their lordships of the Supreme Court held that one of essential requirement of the proviso to s. 33 (2) (b) of the Act was not satisfied and, a



such, the order of the Tribunal dismissing the application was upheld.

4. The scope of s. 33 (2) (b) of the Act was examined in *Lalla Ram v. D.C.M. Chemical*, A.I.R. 1978 S C. 1004 wherein it was held that the jurisdiction of the Industrial Tribunal is confined to the enquiry as to (i) whether a proper domestic enquiry in accordance with the relevant rules/Standing Orders and principles of natural justice has been held; (ii) whether a prima facie case for dismissal based on legal evidence adduced before the domestic tribunal is made out; (iii) whether the employer had come to a bonafide conclusion that the employee guilty and the dismissal did not amount to unfair labour practice and was not intended to victimise the employee, regard being had to the position settled by the Supreme Court that though generally speaking the award of punishment for misconduct under the Standing Orders is a matter for the management to decide and the Tribunal is not required to consider the propriety or adequacy of the punishment or whether it is excessive or too severe yet an inference of malafides may in certain cases be drawn from the imposition of unduly harsh, severe, unconscionable or shockingly disproportionate punishment; (iv) whether the employer has paid or offered to pay wages for one month to the employee; and (v) whether the employer has simultaneously or within such reasonably short time as to form part of the same transaction applied to the authority

before which the main industrial dispute is pending for approval of the action taken by him. It was held that if these conditions are satisfied, the Industrial Tribunal would grant the approval which would relate back to the date from which the employer had ordered the dismissal was observed as under :

"It, however, the domestic enquiry suffers from any defect or infirmity, the labour authority will have to find out on its own assessment of the evidence adduced before it whether there was justification for dismissal and if it so finds it, which would also relate back to the date when the order was passed provided the employer had paid or offered to pay wages for one month to the employee and the employer has within time applied to the authority before which the main industrial dispute is pending for approval of the action taken by him.

(Emphasis supplied)

The question whether the requirement contained in the proviso to s 33 (2) (b) of the Act are mandatory or not was examined by a learned Judge of the Bombay High Court in *B. Lawrice and Co. v. W.B. More* 1981 (42) F.L.R. 272. It was observed therein as under :

"The provisions of Section 33 (2)(b) have come to be considered by the Supreme Court as well as by the High Court in a number of decided cases. The requirements contained particularly in the provision have been observed to be



mandatory requirements and it has been further opined that the payment or tender of wages for one month and the application must be part and parcel of any transaction. Some decisions have indicated that an element of flexibility is permissible in considering what would constitute one transaction, but it is quite clear that compliance will have to be correlated with the immediate offer to make payment and the statements made in the application. The requirements postulated by the proviso can never be said to be complied with if the shortfall is either to be made good after being pointed out in the written statement.

(Emphasis added)

Keeping in view the principles laid down by their Lordships of the Supreme Court in aforesaid four decisions, L.K. Textile Mills's case, (supra) Straw Board Mfg. Co's case, (supra) Poddar Mill's case, (supra) Lalla Ram's case and Metal Press Works Ltd's case (supra) which was approved in Straw Board Mfg. Co's case (supra) and B. Lawrie and Co's case (supra) we are of opinion that before an order for approval is passed, there must be a proper application before the Tribunal as envisaged by s. 33 (2) (b) proviso. In order that an application may be proper it must comply with the conditions contained in the proviso to s. 33 (2) (b) of the Act. According to the proviso, the workman should not be discharged or dismissed until and unless he has been paid wages for one month and

simultaneously an application is made by the employer before the authority for approval of the action taken by it. When an application is made in accordance with the proviso to s. (33) (2) (b) of the Act for approval of the action taken by the employer, that it has to hear the application without delay and is required to pass the order within a period of three months from the date of the receipt of such application. If the payment of wages for one month and filing of the application are not simultaneous, the authority concerned need not grant approval of the action taken by the employer. Fulfilment of the conditions viz, order of dismissal or discharge, payment of one month's wages and making of an application for an approval should be simultaneous and part of the same transaction for granting of approval as held in Straw Board Mfg. Co's case (supra). These are conditions precedent for dealing with an application for approval by the Tribunal and on fulfilment of the conditions, the approval, after holding an enquiry if necessary, can be granted.

5. An argument was also raised that employee has been placed in a better position, for, if the employer does not apply under s. 33 (2) (b), he (workman) may apply under s. 33A of the Act, and as such, it should be held that the fulfilment of the conditions as laid down in proviso to s. 33 (2) (b) of the Act need not be simultaneous. The argument seems to be attractive but it does not bear scrutiny, for s. 33A is a special provision for adjudication as to whether condition of service etc.



**S. K. Mal Lodha**  
**Judge**  
**Rajasthan High Court**

been changed during the pendency of proceedings. This section entitles an employee to file a complaint when his or her employer had contravened the provisions of s. 33 of the Act. This is perhaps the case in which a worker or an employee can come directly to the Court or approach the Tribunal without any reference being made by the Government. Section 33 of the Act is attracted when the following conditions precedent are satisfied.

(1) That there should have been contravention by the management concerned of the provisions of s. 33 of the Act.

(2) That the contravention should have been during pendency of the proceedings before the Labour Court, Tribunal or National Tribunal as the case may be;

(3) That the complainant should be aggrieved by the contravention.

(4) That the application should be made to the Labour Court, Tribunal or National Tribunal in which the original proceedings are pending.

It is then provided by this section that the Labour Court, Tribunal or National Tribunal will adjudicate upon the dispute as if the same had been referred to it for adjudication, that is, like a reference made to it by the appropriate Government subject to the other provisions of the Act. By this section, an employee aggrieved by a wrongful order passed against him in contravention of s. 33 is given a right to move the Tribunal for redress of his grievance without having recourse to s. 10 of the Act. The contention of the learned counsel for the petitioners is accepted that the

fulfilment of the conditions laid down in the proviso to s. 33 (2)(b) of the Act need not be simultaneous, than the employer can at any time file an application under s. 33(2)(b) of the Act to avoid the proceedings under s. 33 A of the Act, which cannot be said to be the object of the section.

6. In this case, the order (Annexure-I) of dismissal from service is dated July 12, 1974. The application under s. 33(2)(b) of the Act is dated July 17, 1974, which was received by registered post on November 27, 1974 by the Tribunal and the wages were sent by money order on July 17, 1974. So the dismissal, payment of wages and making of the application were not simultaneous and, therefore, as there was non-fulfilment of the conditions laid down in the proviso to s. 33 (2)(b) of the Act, the Tribunal, in our opinion was right in declining to grant approval of the action taken by the petitioners. In view of the decisions of the supreme Court in *M/s Poddar Mills Ltd's case*, (supra) *L.K. Textile Mill's case*, (supra) *Snow Board Mfg. Co's case*, (supra) and *Lala Ram's case* (supra) we are of opinion that the view taken in *Associated Cement Companies Ltd's case* (supra) is no longer good law, for, the order of dismissal, payment of wages and making of an application under s. 33(2)(b) of the Act should be simultaneous and part of the same transaction and in this case, they were not simultaneous. We are unable to accept this contention of the learned counsel for the petitioners that they need be simultaneous of that was substantial complia-



nce of the proviso to s. 33 (2) (b) of the Act.

7. It was next argued by the learned counsel for the petitioners that the order (Annexure-6) dated February 4, 1976 is bad and invalid and stands vitiated as respondent No. 1 (the Tribunal) had not heard the application for approval under s. 33(2)(b) of the Act without delay and has not decided it within the period of three months from the date of the receipt of the application as provided in s. 33 (5) of the Act. This argument cannot be accepted for the reason that if the application is not in accordance with the provisions of s. 33 (2)(b), proviso then there is no proper application before the authority concerned so as to hear without delay and to decide the same within a period of three months from the date of its receipt. S. 33(5) is attracted only when the-

re is a proper application in accordance with s. 33 (2)(b), proviso.

The upshot of the above discussion is that as the conditions precedent as laid down in s. 33 (2) (b), proviso were not satisfied and the application for approval was received by the Tribunal on November 27, 1974 much after passing of the order (Annexure-6) dated July 12, 1974 of dismissal from service or respondent No. 2 and one month's wages were sent by money order on July 17, 1974, the Tribunal was right in refusing the prayer made in the application for approval filed by the petitioners under s. 33(2)(b) of the Act.

8. The petitioners are not entitled to any relief.

9. The writ petition is accordingly dismissed without any order as to costs.



## OBSERVATION

(i) Constitution of India, Articles 14 and 16 and 39 (d) —Equal pay for equal work-principle of —Applicability of It is applicable to Jammu and Kashmir State also —Food Inspectors working under local Self Government and Health Department of Government, doing identical work, functions and duties, possessing same qualification and appointed by same statute whether can be placed in different pay scales (No).

(ii) Constitution of India, Articles 14 and 16 and 39 (d)—Food Inspectors under Local Self Government and Health Wing of Government in different pay scales —Whether the mere fact that the Food Inspectors belonging to Local self wing serve under autonomous bodies like the Municipalities justify difference in pay scales (No).

(iii) Constitution of India, Articles 14, 19 and 39 (d) —Food Inspectors under Local Self Government and Health Wing of Government in different pay scales—Whether the fact that the Food Inspectors belonging to Local Self Government are performing some additional duties justify the difference in pay scales —(No)

(iv) Constitution of India, Articles 14 and 16 and 39 (d) —Food Inspectors belonging to Local Self Government and Health Wing of Government Different mode of retirement of the —Whether it justifies the difference in pay scales of the —(No) mode of retirement cannot control the placing of an employee in particular pay or grade.

## OBSERVED BY

Mr. A. S. Anand

Hon'ble Judges, Jammu and Kashmir High Court.

## IN

W. P. No. 291 of 1912, decided on 1st November, 1985, in the case of Rattan Lal Ranju and others, petitioners v. State, Respondent.

## IMPORTANT POINT

*Mode of recruitment can not control the placing of an employee in a particular pay scale or grade.*

## TEXT

Dr. A. S. Anand, J. "Equal pay for equal work" is the doctrine which the petitioners seek to invoke in the present writ petition

The petitioners are qualified Sanitary Inspectors who after obtaining requisite experience and training in food inspection and sampling work came to

be appointed as Food Inspectors. The petitioners, other than petitioner Nos. 3, 4 and 14 were appointed as Food Inspectors vide Annexure '1' to the writ petition while petitioners Nos. 3, 4 and 14 were appointed by a separate order in the same grade vide notification SRO 245 issued by the Government of



Jammu & Kashmir, Health and family planning Deptt. 76 Food Inspectors were appointed as Food Inspectors in the local area shown against each. These Food Inspectors were appointed by the Health Department of the State. The said notification was issued under Section 9 of the Prevention of Food Adulteration Act, 1954, (hereinafter referred to as 'The Act').

2. The State of Jammu and Kashmir has different agencies which act as its administrative arms to discharge various government functions and one of such agency is the local self Wing of the Government which among other functions looks after the functioning of the local bodies also. The Local Self Wing of the Government like the Health Department also appoints Food Inspectors in terms of Section 9 of the Act.

3. According to the petitioners, prior to 1-10-1981, the Food Inspectors serving in the Local Self wing the Government as also in the Health Wing of the Govt. were placed in the same grade and their pay scale was 280-520 and 300-580. The State Government vide order No. 648-HUD/LSG of 1981 dated 1-10-1981 re-organized the Food Inspectors of the Local Bodies and up-graded the post of the Food Inspectors. They were placed in the pay scale of 340-700. The pay scales of the petitioners who were working in the Health Department were, however, not revised and hence the grievance.

4. The State Government set up the Third Pay Commission vide order No. 229-GR/1979, dated 17-8-1979, and

the petitioners also submitted a representation to the Pay Commission on 19-1-1980 in which they represented their causes and requested for the removal of the discrimination between the Food Inspectors serving in the Local Self Wing of the Government and the Food Inspectors serving in the Health Department. The Third Pay Commission submitted its report to the Government which was published on 5-3-1981. The Government thereafter revised the pay scales and the Food Inspectors serving in the Local Self Wing were granted the grade of 680-1240 while those working in the Health Department; like the petitioners, were to get the grade of 600-925. According to the petitioners, neither the State of Jammu and Kashmir, nor the Pay Commission could discriminate between the Food Inspectors serving in the Local Self Wing and those serving in the Health Wing of the State in the matter of their emoluments, pay, etc. That the Food Inspectors working in both the wings of the State have similar qualifications and they perform identical duties and therefore there could not be any disparity between their respective emoluments. Relying upon the judgement of the Supreme Court of India, in *Randhir Singh v. Union of India* and others AIR 1982 SC 879. Wherein their Lordships have held that persons holding identical posts cannot be treated differently in the matter of their pay merely on the ground that they belong to different departments the petitioners seek a direction, writ or order to treat the petitioners at par with Food Inspectors



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ers serving in the Local Self Wing of the Government and to declare the petitioners to have been upgraded like their fellow Food Inspectors serving in the Local Self Wing and to grant them the benefits of the revision of pay scales and the consequential reliefs.

5. The Writ Petition has been resisted by the respondents and inter alia, has been averred that Local Bodies and Municipalities are autonomous bodies and the management of the affairs within these two bodies are regulated by their counsels and that the Government has only supervisory role in the affairs of these two autonomous bodies. It is stated that the petitioners and the Food Inspectors serving in the Local Self Wing are not similarly situated, though conceding that the nature of duties of the Food Inspectors and their job functions under the Act are similar in both cases, because they are appointed by two different employers with different system of recruitment. It is then stated that "Food Inspectors of the Municipal Council are also assigned other functions which are not done by the Food Inspectors of the Health Department." (See Para 9 of the counter). It is then explained that the Local Bodies had two categories of Food Inspectors in the pay scale of 280-520 and 300-580. The two categories were subsequently bracketted together and given a higher pay scale of 340-925. In Paragraph 15 of the counter, while pleading that the petition suffers from laches, the respondent has stated that the petitioners have never brought their grievance

to the notice of the Government nor have they made any representation against placing of the Food Inspectors of local Bodies in the higher pay scale. It is maintained by the respondent that the Food Inspectors of the Health Department and Local Bodies/Municipal Council do not have similar service conditions either. According to the respondents the petitioners belong to the Health Department which is a Government Department while the other Food Inspectors are employees of autonomous Bodies and not of the Government and, therefore, the principle "equal wages for equal work" cannot be invoked in their case, particularly because the Local Self Bodies assign additional responsibilities on the Food Inspectors depending upon their exigencies from time to time.

6. In the rejoinder filed, inter alia, the petitioners have relied upon Annexure 'V' to the writ petition and urged that the stand of the respondents that the Food Inspectors serving in the Local Bodies/Municipalities are not appointed by the Government is an incorrect stand. They have then gone on to say that the Food Inspectors of the Health Department and the Municipal Council are drawn from the same sources and are similarly situated and it is asserted that the appointing authority of both the categories of Food Inspectors is the Government and that the Third Pay Commission did not apply its mind to the case and its recommendation should not have been accepted



by the respondent-State.

7. On the basis of the aforesaid pleadings, the sheet anchor of the petitioners' case is the constitutional goal set out in Art. 39 (b) of the Constitution of India viz. "Equal pay for equal work for both men and women" and the interpretation placed by the Supreme Court of India on the said Article read with Articles 14 and 16 of the Constitution of India in *Randhir Singh's* case (*supra*). Whereas according to Mr. Shah, the petitioners and the Food Inspectors serving under the Local Self Wing of the Government are similarly situate, performing identical nature of duties and as such entitled to the same pay. Mr. Bhashir, the learned Chief Govt. Advocate, submit that the petitioners and the Food Inspectors serving in the Local Self Wing cannot be equated because they are the employees of different employers and are recruited under different recruitment systems.

8. Before proceeding to consider the submissions of the learned counsel for the parties. I must hasten to point out that Art. 39 (b) of the Constitution of India, on which Mr. Shah placed reliance, occurs in Part IV of the Constitution of India and that part of the Constitution is not applicable to the State of Jammu and Kashmir. That, however, does not imply that in this State "equal pay for equal work" is not a doctrine which has any application. The preamble to the Constitution of Jammu and Kashmir declares the resolve of the people of the State of Jammu and

kashmir, in pursuance of the accession of the State to India, to secure to themselves, "equality of Status and of opportunity". Articles 14 of the Constitution of India enjoins on the state not to deny to any person equality before the law or the equal protection of law and Art. 15 declare that there shall be equality of opportunity for the citizens in matters relating to employment or appointment to any office under the State. These two equality clauses of the Constitution of India would become meaningless if the doctrine of equal pay for equal work" is given a go bye only on the ground that Articles 39 (d) of the Constitution of India, does not apply to the State. That apart, Section 22 of the Constitution of Jammu & Kashmir, which provides that the State shall endeavour to secure to all women certain benefits, declares in sub-clause (a), their right to "equal pay for equal work". Of Course, section 22 (a) has relationship with regard to the rights of women but it would be too much to say that this resolve of the State so secure to all women in the State their right to equal pay for equal work has not to be applied *mutatis mutandis* to men folk. Employees in the State, therefore irrespective of their sex, must be treated equally when similarly situated. Construing Article 14 and 16 of the Constitution of India, in the light of the preamble to the Constitution of Jammu and Kashmir and Section 22 (a) of the Constitution of Jammu and Kashmir, I am of the view that the principle "equal pay for equal work" is deducible from these Articles and has to be properly applied, to all the residents emplo-



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ees of J & K also irrespective of their sex provided they are situate and fulfil the other conditions of eligibility for grant of "equal pay". It is in the light of this principle that the contentions of the learned counsel for the parties need to be considered.

9. Shora of unnecessary details, the grounds on which according to Mr. Bashir, learned C. G. A. the doctrine of "Equal pay for equal work" is not attracted to the facts of the present case are:—

(a) that the employers in the cases of the Food Inspectors working in the local Self Govt. and those working in the department of Health are different;

(b) that the Food Inspectors serving with the Municipal Councils etc. are also assigned functions which are not assigned to the Food Inspectors working in the Health Department; and

(c) that the Food Inspectors working in the Local Bodies and the Municipal Councils do not have similar service conditions and have also different systems of recruitment.

and on these basis, it is argued that there is no discrimination as the Food Inspectors serving in the Health Wing and those working in local self Wing, are not similarly situate.

10. According to Mr. Shah, learned counsel for the petitioners on the other hand, the grounds as canvassed by Mr. Bashir to show that two sets of Food Inspectors are not similarly situ-

ate are not valid and do not bear any scrutiny. He argued that the appointing authority in respect of all the Food Inspectors, whether they belong to the Health Department or to the local self Wing of the Government, is the Government and, therefore, it is wrong to contend that the "employer" in the cases of two sets of Food Inspectors are different. He further urged that the nature of duties assigned to the Food Inspectors under the Act are the same, and therefore the State cannot differentiate between them in the matter of their pay and emoluments. Mr. Shah then argued that the difference, if any, in the mode of recruitment has no relevance to the fixation of the pay and emoluments of the employees.

11. I have given my careful consideration to the respective contentions raised at the bar.

12. The State of Jammu and Kashmir for running its administration has different agencies. Those agencies act as its administrative arms. One of such agencies is the local Self Wing of the Government while the other agency for the purpose of this writ petition, is the department of Health. In Para 8 of the Writ Petition, it has been averred by the petitioners that it is the State Government by virtue of the authority vested in terms of Section 9 of the Prevention of Food Adulteration Act, 1954, and Rule 8 of the Rules framed thereunder, which appoints Food Inspectors to serve in the State "either in the Health Wing or the Local Self Wing". In the counter affidavit filed on the affidavit of the Dep-



uty Secretary to the Government, Para No. 8 of the petition, has been replied thus;

Para No. 8 is admitted. Appointment of Food Inspectors either under Rule 8 or in terms of Section 9 of the Act is within the competence of the Government. Functions and duties of the Food Inspectors are not assigned by the Government but are regulated by the PFA Act and the Rules thereunder."

Again in Para No. 9 of the petition, it has been asserted that "the qualification, mode of appointment, the nature of duties of the Food Inspectors serving in the Government in its Health Wing or Local Self Wing are identical. Merely the Food Inspectors are working under the departments of the respondent No. 1 namely the local self and the Health Department, they cannot be treated dis-similarly or differently from each other in the matter of pay and other benefits incidental and attached to their service.....".

13. In their reply to the said Para, the respondents have admitted "whereas the nature of duties of the Food Inspectors is the same and their job functions under the Act are similar, but the mode of appointment in these local bodies is not the same, which otherwise is applicable for recruitment in Government service". (Emphasis supplied)

14. In the face of these pleadings, is it permissible to say that the Food Inspectors working in the different wings of the Government, can be treated differently? The answer, in my opinion, has to be in the "negative". The respondents,

it appears, are raising imaginary defences not supported by law or logic. The method of appointment of the Food Inspectors is envisaged by Section 9 of the Act and as rightly admitted by the respondents, in their counter affidavit the only authority competent to appoint the "Food Inspectors" is the Government. The respondents have admitted that the appointment of the Food Inspectors, whether they serve in the Local Self Wing or in the Health Department is made under Section 9 of the Act read with Rule 8 of the Rules, and once that is the position, it is obvious that the Food Inspectors working in these two different departments are appointed by the same authority under the same provisions of law. Indeed, Municipalities and local Bodies to which the Food Inspectors are appointed are autonomous bodies but the Municipalities and Local Bodies come under the Control of the Local Self Wing of the Government and their being autonomous bodies would not inso facto show that the employer in both the cases are different. If the argument of Mr. Bashir is to be stretched to its logical conclusion, then it would follow that the scales of pay of the officers of the same rank in the State may vary from department to department, notwithstanding the fact that their power, duties and responsibilities are identical. An argument similar to the one as raised by Mr. Bashir, was also advanced before the Supreme Court in *Randhir Singh's case* (supra) and was rejected. Their Lordships observed that "where all things are equal, i.e. where all relevant considerations are the



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same, persons holding identical posts, may not be treated differentally in the matter of their pay, merely because they belong to different no hesitation in holding that the first submission of Mr. Bashir has no force.

15. The learned C. G. A. next relied upon the counter affidavit and in particular on the assertion made therein that the Food Inspectors of the Municipal Council are assigned other functions which are not performed by the Food Inspectors of the Health Department, with a view to show that the two are not similarly situate and cannot be treated identically.

16. In paras No. 9 and 18 (b) of the counter, this assertion has, indeed, been made. However, it appears that this assertion is only a bald assertion. The counter affidavit does not explain what additional duties are assigned to these Food Inspectors. The Food Inspectors. The Food Inspectors appointed under Section 9 of the Act perform identical functions and that position is conceded, as already noticed, in the counter. No order has been placed on the record to show that some additional assignments has been given to the Food Inspectors working in the Local self wing, and, therefore, the argument is not supported by any record. But even if it be assumed for the sake of argument that some additional assignment is given to the Food Inspectors working in the Local Self Wing, it would not justify them being treated differently from the Food Inspectors serving in the Health Department, it is no body's case that the grades which have been

granted to the Food Inspectors working in the Local Self Wing have been granted in view of some "additional assignment". Had it been the case that the Food Inspectors working in the Local Self wing were to be compensated for some additional assignment, the State Government would have granted them some allowance for the additional duties, and not that it could have granted them a different grade altogether. Thus, the argument that the difference in the pay grade is because some additional work is assigned to the Inspectors working in the Municipal Council is not only not supported by any material but even otherwise it is not tenable.

17. I also do not find any force in the last submission of Mr. Bashir that because of the alleged difference in the mode of recruitment of Food Inspectors, working in the two wings, the difference in their pay scale is justified. The mode of recruitment to the service has nothing to do with fixation of pay scales of the employees. It is after an employee enters the service that he becomes entitled to be placed in particular grade of pay irrespective of the mode by which he was recruit. The mode of recruitment cannot control the placing of an employee in a particular pay or grade as the same is fixed under Rules governing their service and becomes available only after employment is secured by the concerned employees. The argument must, therefore, fail.

18. Since, it is an admitted case that prior to 1-10-1982, the Food Inspectors serving under the local self wing



of the Government and those serving in the Health wing of the Government were placed in the same grade it necessarily follows that there was no justification to treat them differently thereafter, in the matter of their pay and emoluments. The counter affidavit does not explain as to what special factors exist which may justify differential treatment.

19. From a perusal of the writ petition, the counter thereto, and the rejoined, it becomes obvious that the qualifications and nature of the duties the source of a appointment of the Food Inspectors serving in the Local Self Wing as also in the Health wing of the State, are absolutely identical. The mere fact that the Food Inspectors belonging to Local Self Wing serve under autonomous bodie slike the Municipalities etc. would not justify differential treatment.

20. Learned C. G.A. once again vehemently argued that the Government is not the appointing authority of the Food Inspectors serving with the local Bodies with a view to urge that Randhir Singh's case (supra) has no application to the facts of the present case. The argument is falsified by the record itself. Annexure "V" to the writ petition is an order issued by the Deputy Secretary to Govt. and pertains to the Food Inspectors serving in the Local Bodies.

21. Mr. Bashir, submitted that the said order had not been issued under any authority but that appears to be an argument of despair. There is a presumption that official acts have been properly done and that presumption has

not been rebutted. That apart, the record produced by the Learned C.G.A. relating so promotion of Sanitary Inspector to the posts of Food Inspectors contains an order issued by the Srinagar Municipality dated 16-11-1971 and it was on the basis of that it was sought to be argued by the learned C.G.A. that employer is the case of Food Inspectors serving in the local self wing is not the Government. That order in may opinion, does not support the submission made. The opening sentence of the order dated 16-11-1971 reads "In pursuance of the Government order No. 199-UD/LM of 1971 dated 13-11-1971." and this sentence itself shows that the Municipality had done was only to pass an order pursuant to an earlier Government order dated 13-11-1971 redesignating certain sanitary Inspectors as Food Inspectors. The line of teat order also makes amply clear. It reads "that this order will have effect concurrently with the Government order referred to above." The Municipalities, therefore, only performed the follow up action and the record does not support the submission made by Mr. Bashir to the contrary.

22. The principle "equal pay for equal work" is not an abstract doctrine but is one of substance. It is a constitutional goal receiving its teeth from Article 14 and 16 of the Constitution of India. If this principle were to be ignored, then the equality clauses of the constitution of India would be dead clause for similarly situated employees.



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in the instant case, find that there is an irrational classification made by the State in as much as the Food Inspectors while doing identical work, performing identical functions and duties, besides possessing same qualifications and appointed by virtue of the same statute by the same appointing authority, draw different scales of pay. This is an act of hostile discrimination and cannot be supported.

23. The petitioners had filed an application seeking permission to file the writ petition in the representative capacity and in the facts and circumstances

of the case, that permission has been accorded.

24. For what has been said above, I allow this writ petition and direct the respondent state to fix the pay scales Food Inspectors working in the Health Department at par with the Food Inspectors serving in the local self wing of the Government with effect from 1st of October, 1981. They shall also be given the benefit of the revised pay Rules and all other consequential benefits.

25. In the circumstance of the case, there shall be no order as to costs.

Petition allowed.



IT IS THE ESSENCE OF DEMOCRACY  
TO OBEY  
NO MASTER BUT THE LAW



A. S. Anand

Judge

Jammu &amp; Kashmir High Court

## OBSERVATION

(i) **Jammu and Kashmir Civil Services (Classification, Control and Appeal) Rules, 1956—Rule 25 (3) Promotion to the post of Senior Laboratory Assistant—Rules provide promotion by seniority—Promotion made by superseding the senior on the basis of experience of biochemistry laboratory which experience was also possessed by the senior official superseded—set aside.**

(ii) **Appointments—Fixing of a reasonable criteria by the authorities for the when.**

(iii) **Departmental promotion Committee—Constituted under the in applicable rules—Recommendations of the I has no legal validity or force.**

## OBSERVED BY

Mr. A.S. Anand

Hon'ble Judge, Jammu &amp; Kashmir High Court

## IN

W.P. No. 587 of 1982, decided on 17th April, 1985, in the case of Roshan Lal Mattoo, Petitioner v. Principal Medical College Jammu and others, Respondents.

## IMPORTANT POINT

*It is open to the authorities to fix a reasonable and fair criteria for making appointments and apply it uniformly but the same can be done either when there are no Recruitment Rules in existence or when the Relevant Recruitment rules itself authorises such a course being adopted.*

## TEXT

A. S. Anand, Act, C.J.—The petitioner and respondent's 8 and 9 namely Shri Himmat Singh and Ravinder Kumar Sharma, has joined the service in the medical Department of the Jammu and Kashmir State and were working as Junior Assistants. Two posts of senior Laboratory Technicians, were filled up by promotion by the Government Medical College, Jammu, vide order No. 419 of 1982 dated 4-6-1982, and respondent Nos. 8 and 9 were so promoted. Their promotion has been called in question by the petitioner through the medium of this

writ petition.

2. The petitioner has joined the Service in the Medical Department of the Jammu and Kashmir State on 10-8-1969, and was promoted as Junior Laboratory Technician on 1-6-1965. Respondent No. 8 joined the medical Education Department on 2-4-1964 and was promoted as a Junior Laboratory Technician on 28-6-1969 (28-5-1969 according to respondent Nos. 1 and 2) Respondent No. 9 joined service in the Medical Education Department on



20-1-1964 and was promoted as Junior Laboratory Technician on (5-5-1973 according to respondent No. 1 and 2). A seniority list of Junior Laboratory Technicians working in the Associated Hospitals and Government Medical College, Jammu, was issued by the Administrative Officer of the Associated Hospitals, Jammu, and the petitioner was shown at S. No. 1 while respondent No. 8 was shown at No. 2 and respondent No. 9 at S. N. 5. This placing in the Seniority List is based on the dates on which the petitioner and respondent Nos. 8 and 9 were promoted as Laboratory Assistants. The aforesaid seniority list was circulated by the Administrator Associated Hospitals, Jammu vide his No. ADM/AJH/Sen/NG/80-81/5376-84 dated 28-8-1981. The grievance or petitioner as spelt out in the petition is that though he was senior to respondent Nos. 8 and 9, he was not promoted as a Senior Laboratory Technician when respondent Nos. 8 and 9 were so promoted. In the petition the petitioner has submitted that there were no rules for recruitment to the Nongazetted posts in the Medical Education Department, though certain draft Rules on the subject were framed in 1979, and were acted upon for making the appointments and promotions to the non-gazetted services in the Medical Education Department. It has also been averred that in the absence of any such recruitment rules, the provisions of Jammu and Kashmir Civil Services (Classification, Control, and Appeal) Rules, 1956, hereinafter

called as "1956 Rules" and Jammu and Kashmir Civil Services (Decentralization of recruitment to non-gazetted cadres) Rules, hereinafter referred to as "1969 Rules" are applicable for promotion to non-posts in the Medical Education Department. It is asserted that the posts Senior Laboratory Technicians in the Medical Education Department have not been declared as selection posts and the promotion to the raid posts have to be made on basis of the seniority alone. Support for this assertion is sought from Rule 7 of 1969 Rules and Rule 25 of 1956 Rules.

3. It is then averred by the petitioner that a departmental promotion committee had been constituted under the Draft Rules of 1979 and 1969 Rules, which recommended the promotion of respondent Nos. 8 and 9 to the posts of Senior Laboratory technicians. The petitioner has averred that not only the recommendation of the D. P. C. was mala-fide, but that the proceedings of the D. P. C. itself were invalid because of the participation of strangers in the D.P.C. In this connection it is stated that Dr. R. K. Arya, professor and Head of Department of Pathology, Medical College, Jammu though not a member of the D. P. C. participated in the selections made by the D. P. C. and his participation rendered the proceeding D. P. C. as unconstitutional, illegal, and void. Besides, it has also been averred that Dr. Arya's presence was meant to facilitate the promotion respondent No. 9. The petitioner



also averred that Dr. R. N. Sachdeva, Dy. Superintendent S. M. G. S. Hospital, Jammu, was associated though he was not a member of the D.P.C. to facilitate the promotion of respondent No. 8 who had been working with him in the hospital.

4. According to the petitioner, a person holding a certificate of successful completion of course of Laboratory Assistant from Jammu and Kashmir State Medical Faculty is capable of attending any department including bio-chemistry and pharmacology as the nature of the duty is the same and no other specific qualification is either prescribed or required. His contention is that he is working in the Bio-Chemistry Department of the C. D. Hospital Jammu which is attached to Medical College, Jammu for almost 10 years and was, therefore, fully experienced and on account of his seniority was entitled to promotion as a senior Laboratory Technician in the Bio-Chemistry department in preference to respondent Nos. 8 and 9. He has on these basis challenged his supersession as violative of the 1956 Rules and the fundamental rights.

5. To the counters filed on behalf of the Principal Medical College and the Administrator Associated hospitals, Jammu, the placement of the petitioner and respondent Nos. 8 and 9 in the seniority list against S. Nos. 1, 2, and 5 respectively has been admitted. According to these respondents, the promotion were made on the basis of the Draft Recruit-

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**Judge**

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ment Rules of 1979, for the following reasons :—

(i) Hospital service involving patient care being essential services there was urgency for filling up these posts without which the work of the hospital was suffering.

(ii) The same draft Recruitment Rules had already formed the basis of filling up of these posts in Medical Colleges, Srinagar.

(iii) The urgency of filling up of these posts had also been emphasized by the teaching department of the medical College, Jammu, in view of having started the post graduate courses in various specialities."

These respondents, have, however, conceded that the Draft Rules had not been sanctioned by the Government. The applicability of 1969 Rules to the case of the promotion by the non-gazetted service in the Medical Education Department, has also been denied. Respondent Nos. 1 and 2 have admitted that the DPC had been constituted and that Dr. R. K. Arya, and Dr. R. N. Sachdeva, Dy. Superintendent S.M.G.S. Hospital Jammu, were associated with the DPC though they were not members of the DPC. It has been stated that "Dr. R. K. Arya Professor and Head of the Department of Pathology was never the regular member of D. P. C. but he attended the meeting of D. P. C. as an expert with regard to the nature of



Senior Laboratory Technicians of the Hospital and departments of Bio-chemistry and Pharmacology" (Para 11 of the counter). However, in para No 13 of the counter, it has been stated "Dr. Arya M. O. D. of Pathology never attended the meeting of the D. P. C." so far as Dr. R. N. Sachdeva is concerned, it has been stated in the counter that on the relevant date, he was performing the functions of the Medical Superintendent of the Hospital in the leave arrangement of the Medical Superintendent who was a member of the D. P. C. and he attended the meeting of the D. P. C. in that capacity. In order to justify the exclusion of the petitioner from promotion, respondent Nos. 1 and 2 have gone on to assert that "the petitioner has never worked either in the Bio-Chemistry department or in the Pathology department and, therefore, he does not fulfil the conditions laid down in Draft Recruitment Rules of having 5 years experience/Service in the concerned." The charge of mala-fide has, however, been denied.

6. In the rejoinder filed to the counter of respondents Nos. 1 and 2, the petitioner has asserted that the contention that he does not have five year's experience in the department of bio-chemistry is false and in support of his plea, he has filed a certificate issued by the Deputy Superintendent CD Hospital, Jammu, dated 1-6-1982, where it is stated that the petitioner "has been working in Clinical bio-chemistry Laboratory of this hospital since 9-1-74 to date, where bio-chemical and clinical

Pathological tests for blood, urine, stools and various body fluids are carried out. The petitioner has also placed on record with his rejoinder copy of letter No. Est/5553 dated 19-3-1983, from the Medical Superintendent CD Hospital, Jammu, wherein the Medical Superintendent CD Hospital, Jammu, supported the case of the petitioner and opined that petitioner "appears to have the superior claims than the other who have been allowed to supersede." In the said letter the Medical Superintendent has also gone on to state. "It is not understood as to how Departmental Promotion Committee resorted to pick and choose when the posts to which they were to be promoted were totally seniority posts." The petitioner has also filed copies of two orders Nos. NG/82-91/ME and NG/92-105/ME dated 5-2-1982, which reveal that the appointments of Senior Laboratory technicians were made at Srinagar according to the seniority irrespective of the fact as to in which particular section or the department the Junior Laboratory Assistant was functioning.

7. Respondent Nos. 8 and 9 in the counter filed by them have, however, set up altogether a new plea in as much as they have stated that the seniority list (the correctness of which was not disputed by respondent Nos. 1 and 2) had not been properly prepared and in this connection have asserted that two distinct departments have been created by virtue of government order No. 667-GD of 1973 dated 28-8-1973, whereby the department of Medical Education was



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separated from the Health Department and vide circular order dated 7-11-1977, the government gave an option to the officials who originally belonged to the Health Department, due to the transfer of Govt hospitals to the Medical Education Department to opt whether they would like to remain in the Medical Education Department or to go back to service cadre of the Health Department; that whereas respondent Nos. 8 and 9 gave their option that they would remain in the Medical Education Department, the petitioner gave no such option and chose to go back to the Health Department, and, therefore, the seniority list had been wrongly prepared and that the petitioner did not belong to the Medical Education Department. These respondents have also stated that the seniority alone is not the sole basis for promotion and that the promotion has to be made on the basis of merit and ability, seniority being considered only where merit and ability are approximately equal. (Para No. 4 of the counter). It has been denied by them that Dr. N. Sachdeva and Dr. R.K. Arya participated in the DIP.C. (vide para No. 14 of the counter). According to these respondents, the petitioner was not entitled to be considered for the post of Senior Laboratory Technician in Bio-Chemistry and Pharmacology in the Medical College, on the ground that he did not possess experience in the said fields. They admitted that though primarily the qualifications for appointment to the post of Laboratory Technician is a successful completion of the course from the Jammu

and Kashmir State Medical Faculty but the experience in the departments of Bio-Chemistry and Pharmacology alone was to be taken into account for the purpose of promotion in the said departments.

8. In the rejoinder filed by the petitioner to the counter respondent Nos. 8 and 9, he has stated that he had exercised the option to remain in the Medical Education Department in terms of circular No. 76/ME/NG/77 dated 7-11-1977 and that he continued to be in the Medical Education Department from the date of his inception and he had never opted to go back to the Health Department. He has also asserted that he has been working in the Bio-Chemistry Section much before respondent No. 8 and that his experience in the Bio-Chemistry department is much more than that of respondent No. 9 also. Respondent Nos. 1 and 2 have not contested the claim of the petitioner that he belongs to the Medical Education Department and is senior to respondent Nos. 8 and 9.

9. These are the complete pleadings of the parties. I have heard Mr. H. L. Bhagotra learned counsel for the petitioner, Mr. S. D. Sharma learned C. G. A. for respondent Nos. 1 to 7 and Mr. Joginder Singh for respondent Nos. 8 and 9.

10. At the hearing of this petition, learned counsel for the petitioner rightly conceded that 1969 Rules were not applicable to the case of the petitioner. He has made this concession in view of



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S. R. O. 349 dated 16-7-1973 which had amended the 1979 Rules by substituting a new sub-Rule (1) of Rule 5 which was further amended by S. R. O. 183 dated 27-4-1974, which provided that the posts in the Medical Education Department other than those borne on the State Civil Secretariat Cadre were to be excluded from the purview of Rules 1969. In view of this position, it was asserted by the learned counsel for the respondents that the constitution of the DPC under Rule 7 of the 1969 rules, would become meaningless and it is not necessary for this Court to determine the effect of the participation of Dr. Arya and Dr. Sachdeva in the proceedings of the same. I agree, but, would, however, like to observe that the assertions contained in the counters filed by respondent Nos. 1 and 2 as well as respondent Nos. 8 and 9 denying the participation of Dr. Arya and Dr. Sachdeva during the deliberation of the Selection Committee stand completely negatived from a perusal of the minutes of the D. P. C. which were produced before this Court, under its directions by the learned C. G. A. The minutes record :

"Dr. A. K. Arya H. O. C. Pathology and Dr. C. L. Dhar H. O. D. Anaesthesiology cum Medical College, Jammu were also associated with the deliberations of the D.P. C. at the time of considering candidates for promotion to the vacant posts of Senior Laboratory Technicians, including Cytotechnologist and Senior Theatre Assistant Anaesthesia Technician respectively."

These minutes thus give a direct lie to the case set up in the counters but in view of the fact that 1969 Rules are not applicable to the case, I refrain from going into effect of the participation of Dr. Arya in the deliberations of D. P. C. That being the position, it becomes obvious that the recommendation of the DPC constituted under the inapplicable rules of 1969, have no legal validity or force and the promotions made on the basis of those recommendations acquire no legal validity, but the learned C. G. A. made an attempt to wriggle out of the position and justify the promotions of respondent Nos. 8 and 9 and the supersession of the petitioner by asserting that though in the absence of the sanction by the Government, the draft Rules of 1979, of the Medical Education Department, did not have any statutory force, yet it was open to the authorities to follow the procedure for promotion as contained in those Rules, when the said Procedure was fair and reasonable and was uniformly applied. The learned C.G.A. contended that the Rules of 1979 did not constitute the source of the power to make recruitment and that it was always open to the authorities concerned to fix criteria for recruitment and such criteria could not be called into question, in it was uniformly applied and did not violate the principles of natural justice. Learned counsel submitted that the constitution of the D. P. C. under the circumstances, should be viewed in a different perspective and its recommendation considered on the basis that the same were based on criteria which was



**A. S. Anand****Judge****Jammu & Kashmir High Court**

uniformly applied and was otherwise also reasonable and fair. Mr. Sharma argued that the criteria which was applied for making promotions to the posts of Senior Laboratory Technicians both in the Medical Education Department at Srinagar and Jammu, was that promotions were made on the basis of ability, and experience in the "concerned Sections", seniority playing its role only where the ability and experience were nearly equal, and, when viewed in this light the promotions of respondent Nos. 8 and 9 in preference to the petitioner were justified.

11. Of Course, it is open to the authorities to fix a reasonable and fair criteria for making appointments and apply it uniformly, but the same can be done either when there are no recruitment Rules in existence or when the relevant recruitment rules itself authorises such a being adopted.

12. In the present case, the position is entirely different. In the first place, it deserves notice that in the absence of any other valid recruitment rules the promotions were required to be made in accordance with Rule 25 (3) of the 1956 Rules, and that rule clearly provides for "Seniority" to be the guiding factor and no criteria could be fixed by the authorities which runs counter to the provisions of Rule 25 (3) of the 1956 Rules, and, in the second place, even if Rules 25 (3) of 1956 Rules, was not there, the criteria on which Mr. Sharma relies was not uniformly applied. A bare look at the order No. NG/82-91/ME and Order No. NG/92-105/ME dated

5-2-1981 (Annexures p 3 and p 4) to the rejoinder show that the promotions were made in the Srinagar Medical Education Department on the basis of "seniority" irrespective of the fact as to in which particular section, the junior Laboratory Assistant was functioning. Shri Ghulam Qadir Shah, Senior Technician was directed to be relieved forthwith from the department of Microbiology on promotion and was directed to report to HOD Pathology; the two sections being entirely different. In Jammu, however, the supersession of the petitioner is sought to be justified on the ground that the petitioner did not belong Bio-Chemistry Section in which the promotion was made. This position, as already noticed, is factually incorrect, in view of the certificate of the Deputy Superintendent CD Hospital, Jammu, but even if it be assumed for the sake of argument that the petitioner did not belong to Bio-Chemistry section he could not be superseded, if the criteria of "Seniority" which was applied in Srinagar was also applied at Jammu. There was thus no justification for the exclusion of the petitioner from promotion on the basis of the so called criteria on which respondents 1 and 2 rely to justify their action. Besides the petitioner possessed the requisite experience in the concerned Section and he could not have been ignored.

13. As noticed earlier, in the absence of 1969 Rules, and the Draft Rules of 1979, promotions could only be made in terms of Rule 25 (3) of the 1956 Rules. The said Rule reads as follows:



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S. R. O. 349 dated 16-7-1973 which had amended the 1979 Rules by substituting a new sub-Rule (1) of Rule 5 which was further amended by S. R. O. 183 dated 27-4-1974, which provided that the posts in the Medical Education Department other than those borne on the State Civil Secretariat Cadre were to be excluded from the purview of Rules 1969. In view of this position, it was asserted by the learned counsel for the respondents that the constitution of the DPC under Rule 7 of the 1969 rules, would become meaningless and it is not necessary for this Court to determine the effect of the participation of Dr. Arya and Dr. Sachdeva in the proceedings of the same. I agree, but, would, however, like to observe that the assertions contained in the counters filed by respondent Nos. 1 and 2 as well as respondent Nos. 8 and 9 denying the participation of Dr. Arya and Dr. Sachdeva during the deliberation of the Selection Committee stand completely negatived from a perusal of the minutes of the D. P. C. which were produced before this Court, under its directions by the learned C. G. A. The minutes record :

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A. S. Anand

Judge

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12. In the present case, the position is entirely different. In the first place, it deserves notice that in the absence of any other valid recruitment rules the promotions were required to be made in accordance with Rule 25 (3) of the 1956 Rules, and that rule clearly provides for "Seniority" to be the guiding factor and no criteria could be fixed by the authorities which runs counter to the provisions of Rule 25 (3) of the 1956 Rules, and, in the second place, even if Rules 25 (3) of 1956 Rules, was not there, the criteria on which Mr. Sharma relies was not uniformly applied. A bare look at the order No. NG/82-91/ME and Order No. NG/92-105/ME dated

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13. As noticed earlier, in the absence of 1969 Rules, and the Draft Rules of 1979, promotions could only be made in terms of Rule 25 (3) of the 1956 Rules. The said Rule reads as follows:



“(3) All other promotions shall be made in accordance with seniority and subject to any tests or special qualifications prescribed by Govt. unless.

(a) the promotion of a member has been withheld as a penalty;

(b) a member is given special promotion for conspicuous merit and ability.”

One has to look at the Rules that the seniority is the guiding criteria and that guiding criteria has been totally ignored in this case as the settled seniority of the petitioner was brushed aside while superseding him as promoting respondents 8 and 9. Dealing with the scope of Rule 25 (3) of the 1956 Rules, in *Lal Chand Pargal and ors. vs Director N. E. S. and ors A.I.R. 1970 Jammu and Kashmir 57* a FULL BENCH of this court observed:

“If there is promotion from one grade to another, it may be covered by sub-rule (3) and would have to be governed by seniority alone until and unless promotion is withheld by way of penalty or way of penalty or when some other member is given promotion for extra-ordinary merit and ability.”

It is not the case of the respondent Nos. 1 and 2 that the promotion had been withheld from the petitioner either as a measure or penalty or that respondent Nos. 8 and 9 possessed extra-ordinary merit and ability, as compared to the petitioner. That being the position, the seniority of the petitioner

could not be ignored or brushed aside while making promotions within the ambit of Rule 25 (3) of 1956 Rules, which it is conceded, applies to the present case, particularly when the placement in the seniority of the petitioner and respondents 8 and 9 at S. Nos. 1, 2, and 5 respectively in the seniority list has been questioned, and rightly so by respondent Nos. 1 and 2. It is futile for respondent Nos. 8 and 9 to contend that the petitioner did not belong to the Medical Education department and that his experience in the Health Department could not be taken into account for fixing his seniority not only because the petitioner has categorically asserted in his rejoinder that he had given his option to continue in the Medical Education Department, but also because the concerned authorities, i. e. respondent Nos. 1 and 2 have not disputed that the petitioner continues to be in the Medical Education Department and when he so continued cannot be denied the benefit of service rendered by him, prior to the bifurcation, in the Health Department for determination of his seniority. The petitioner therefore, according to the admitted position is senior to respondent Nos. 8 and 9 and this position, was frankly conceded in the counter filed by respondents 1 and 2 and at the bar by the learned C.G.A.

14. I do not find any force in the submission of Mr. Sharma or Mr. Joginder Singh that the petitioner could not be promoted as a Senior Laboratory technician in the Bio-chemistry Section, because he did not possess the



**A. S. Anand****Judge****Jammu & Kashmir High Court**

requisite experience in the bio-chemistry section. The certificate Annexure p. 1 to the rejoinder issued by the Deputy Superintendent CD Hospital certifying that the petitioner had been working in the Clinical Bio-Chemistry Laboratory of the hospital since 9-1-1974, is a complete answer to their argument. Mr. Sharma in the face of the certificate had sought time to contact the Principal, Medical College, Jammu to ascertain the position and he received a communication from the Principal which he did not wish to place on record being a privileged communication between him and his client. The learned C. G. A. however, on the basis of communication, argued that petitioner did not "in the true sense" have experience in Bio-chemistry. I fail to understand this assertion. Either a technician has experience or he was not, but there is not such thing as experience but not "in the true sense". Had this communication been placed on record, I could have asked the principal Medical College to appear in the court and explain what he meant by it, but since it was not so placed, I am deprived of knowing as to what he meant by the use of that expression. I asked Shri S. D. Sharma, C.G. A. repeatedly to explain it and must say in fairness to him that he submitted that he did not want to adopt that argument, particularly, in view of the practice followed in Srinagar while making promotions of Junior Laboratory Technicians to the posts of Senior Laboratory Technicians was revealed by the orders Annexure p. 3, and p. 4 to the rejoinder. To me it appears, that the

expression not in the true sense" was used by the Principal in his communication to Mr. Sharma, perhaps, in despair, some how or the other to justify the otherwise unjustifiable suppression of the petitioner and promotions of his juniors respondent Nos. 8 and 9 in preference to him in clear violation of the mandate of Rule 25 (3) of the 1956 Rules.

15. Thus, for what has been stated above, and considered from any angle the promotion of respondents 8 and 9 by ignoring the established seniority of the petitioner made vide order No. 419 of 1982, dated 4-6-1982, cannot be sustained.

16. In the result, this writ petition succeeds and is allowed. By a writ of Certiorari I quash the order No 419 of 1982 dated 4-6-1982, in so far as it pertains to the promotion of S/Shri Himmat Singh and Ravinder Kumar Sharma respondents 8 and 9 respectively as senior Laboratory technicians. By a Writ of Mandamus I direct and command respondents 1 and 2 to fill the posts of Senior Laboratory Technician strictly in accordance with Rule 25 (3) of the 1956 Rules, on the basis of seniority from amongst the junior Laboratory technicians, in the light of the observations made in this judgement.

17. The petitioner shall also be entitled to costs.

Counsel fee Rs. 300/- (Rupees three hundred only). The costs shall be paid by respondents 1 and 2.

Petition allowed.



IT IS THE ESSENCE OF DEMOCRACY  
TO OBEY  
NO MASTER BUT THE LAW



**K. P. Acharya**  
**Member**  
**Central Admn. Tribunal**

### OBSERVATION

(i) **Reduction to lower grade with order not to postpone future increments and to be automatically restored after the penalty was over—Does not effect seniority in anyway.**

(ii) **Rule 104 of P & T Manual (Vol. III), FR 29 (1)—Petitioner reduced to lower grade and pay for two years without postponing future increments—His junior promoted to higher post when he was undergoing penalty—Order never contemplated any loss of seniority—He must be promoted after he is restored to his original post.**

### OBSERVED BY

Mr. K. P. Acharya and  
Mr. B. Mukhopadhyay  
Hon'ble Members, Central Administrative Tribunal, (Circuit Bench at Cuttack,)

### IN

OJC No. 593 of 1981, decided on 16th April, 1986, in the case of Bairagi Charan Patnaik, Applicant v. Union of India, Respondent.

### IMPORTANT POINT

*Reduction to lower grade with order not to postpone future increments and to way be automatically restored after the penalty was over does not effect seniority in any.*

### TEXT

K. P. Acharya, Judicial Member.  
The petitioner entered into the Postal Department as a Lower Division Clerk on 13th August, 1947 and on 16th December, 1948 Opposite Party No. 3 (Shri S. N. Patnaik) joined the post of Lower Division Clerk. On 21st October, 1964, the petitioner was promoted to the post of a Head Clerk in the same office and the Opposite Party No. 3 got his promotion the post of a Head Clerk on 24th November, 1969.

2. While the petitioner was working as a Head Clerk in the Lower Selection Grade, to seprate departmental procee-

dings had been initiated against the petitioner—one on 4th October, 1969 and the other on 21st March, 1970. So far as the proceeding initiated on 4th October, 1969 is concerned, the disciplinary authority, namely, the Post Master General of Orissa (Opposite Party No. 2) by his order dated the 7th November, 1975 imposed a penalty on the petitioner by ordering Compulsory retirement of the petitioner who had preferred an appeal and the appellate authority set aside the order of punishment and directed reinstatement of the petitioner and further more ordered that the entire period from



7th November, 1975 to 25th May, 1976 should be treated as on duty including the period of suspension, namely, from 8th September, 1969 to 2nd November, 1970.

3. Further case of the petitioner is that with regard to the second proceeding which was initiated on 21st March, 1970, the disciplinary authority by his order dated the 8th July, 1975 inflicted a penalty on the petitioner by reducing him to the post of an Upper Division Clerk for a period of two years from the date of order passed by the disciplinary authority.

4. The grievance of the petitioner is that though Departmental promotion Committee was constituted and they met on two occasions, yet the case of the petitioner was not favourably considered and the Opposite Party No. 3 was given promotion illegally to the detriment of the interest of the petitioner. Therefore, the petitioner invoked the extraordinary jurisdiction of the High Court of Orissa under Article 226 of the Constitution with a prayer to command the respondents declaring the petitioner as senior to the opposite Party No. 8 and furthermore a direction to be given to the Opposite Parties No. 1 and 2 to give to the petitioner all service benefits thereto.

5. By virtue of the provisions is contained in the Administrative Tribunals Act, 1985, this case has been transferred to the Tribunal for disposal according to law.

6. In their counter affidavit, the Opposite Parties including Opposite

Party No. 3 maintained that though the Opposite Party No. 3 was initially, at the time of appointment to the post of Lower Division Clerk and promotion to the post of Upper Division Clerk junior in the petitioner, yet by virtue of the fact that the petitioner had been compulsorily retired and there being a break of service for a particular period and furthermore in the second departmental proceeding the petitioner having been demoted to the lower rank, the opposite Party No. 3 was promoted to the higher rank because of the seniority of the said Opposite Party No. 3 and in such circumstances, the petitioner has no legitimate grievance claiming redress and, therefore, his application should be dismissed.

7. After hearing learned counsel for both sides we had delivered our conclusions in the open Court, soon after the hearing was concluded stating that our reasons would follow later and, therefore, the reasons are given here under.

8. Before we give our findings on the different contentions raised by counsel appearing for the Opposite Parties No. 1 and 2 and the counsel appearing for the Opposite Party No. 3, it would be worthwhile to mention the admitted case of the parties which are as follows:

(a) Entry into service by the petitioner on 13th August, 1947 as a Lower Division Clerk.

(b) Entry into the service by Opposite Party No. 3 on 16th December, 1948 as a Lower Division Clerk.



**K. P. Acharya**  
**Member**  
**Central Admn. Tribunal**

(c) Promotion of the petitioner to the cadre of Head Clerk on 21st October, 1964 and promotion of Opposite Party No. 3 to the same cadre on 24th November, 1969.

(d) Initiation of the two departmental proceedings against the petitioner on the two different dates mentioned above—one of which initially ended in the compulsory retirement of the petitioner and subsequently set aside by the appellate authority and furthermore the infliction of punishment on the petitioner in respect of the second proceeding and order passed reducing the petitioner to the lower grade.

9. All the above mentioned facts being admitted, now it remains to be considered and adjudicated by the Tribunal as to whether the petitioner has lost his original seniority by virtue of the punishment awarded to him in the second proceeding. If it is held that the petitioner had lost his seniority due to the infliction of penalty in the second proceeding, this application is bound to be dismissed otherwise by virtue of the order passed by the disciplinary authority in the second departmental proceeding, if it is held that the nature of punishment will not create a bar for the seniority of the petitioner being computed as if no departmental proceeding had been initiated against him, then the application is bound to be allowed.

10. In order to resolve this pro-

blem and for proper adjudication of the rights of the parties, it is necessary to quote the relevant paragraph of the order of the disciplinary authority, which runs thus :

“After detailed consideration of the record of inquiry, the reply of Sri Bairagi Charan Pattnaik to the show cause notice and all the facts and circumstances of the cases, I, Sri Victor. J. S. Perianayagam. Postmaster General, Orissa Circle, Bhubaneswar order that Shri Bairagi Charan Pattnaik, officiating Head clerk, office of the postmaster General, Orissa Circle should be reduced to the lower post of Upper Division Clerk for a period of 2 (two) years from the date of this order. The period of reduction will not operate to postpone his future increments. On expiry of the period of reduction, Shri Bairagi Charan Pattnaik will be promoted automatically to the post from which he was reduced and during the period of reduction he will draw pay annum 500/- (Rupees five hundred) only per month in the lower post of Upper Division Clerk”

This order is to be found in Annexure III and therein it is specifically stated by the disciplinary authority that the period of reduction will not operate to postpone his future increments and on expiry of the period of reduction, the petitioner will be promoted automatically to the post from which he was reduced. This observation of the disciplinary authority eventually means that



the dirty lines shrouded over the service record of the petitioner would be completely washed away. At this point, it is necessary to quote the provisions contained in Article 104 of the posts and Telegraphs Manual (Volume III) sub-rules (ii) and (iii) Rule 104 of the said Manual contains as stated here-under :

“(ii) Where the period of reduction is specified, whether, on the expiry of the period the Government servant is to be promoted automatically to the post from which he was reduced ; and

(iii) Whether on such promotion, a Government servant will regain his original seniority in the higher service, grade or post or higher time scale which had been assigned to him prior to the imposition of the penalty.

In cases where the reduction is for specified period and is not to operate to post one future increment, the seniority of the Govt. servant on re-promotion may, unless terms of the orders of punishment provide otherwise, be fixed at what it would have been but for his reduction. Where, however, the reduction is for specified period and is to operate to postpone future increment, the seniority of the Govt. servant, on re-promotion may, unless the terms of the order of punishment provide otherwise, be fixed by giving credit for the period of service rendered by him in the higher service, grade or post or higher time scale. In cases where the order of punishment does not specifically mention the points referred to in previous para-

graph, the Government servant on whom the penalty of reduction for a specified period is imposed, will, on completion of such period, be promoted automatically and his seniority determined in the following manner :

(a) if the period of reduction is to operate to postpone future increments, the seniority of the Government servant should be determined, on re-promotion, by giving credit for the period of service rendered by him in the higher grade etc. prior to his reduction;

(b) If the period of reduction does not operate to post-pone future increments, the Government servant, on re-promotion, will regain his seniority as it existed before his reduction”.

From the above quoted provision, it is crystal clear that if the disciplinary authority has not otherwise directed that the Government servant is to be promoted automatically and is to regain his original seniority what it would have been but for his reduction and furthermore it is still clarified in sub-rule (10) of Rule 104 that on re-promotion the Government servant will regain his seniority as it existed before his reduction.

The disciplinary authority has passed an order which is in consonance with the provisions contained in Rule 104 (quoted above). The disciplinary authority in compliance with the provisions contained in the said rule has specifically stated that after expiry of two years service in the lower grade the petitioner would be automatically pro-



moted and Mr. P. Kar. the learned counsel for the petitioner strongly relied upon the provisions quoted above and submitted that seniority of the petitioner is regained and should not be affected in any manner whatsoever. Mr. Kar. also relied upon the provisions contained in Fundamental Rules 29 (1) which runs thus :

“F. R. 29 (1) provides that if a Government servant is reduced as a measure of penalty to a lower stage in this time-scale, the authority ordering such reduction shall state the period for which it shall be effective and whether on restoration, the period of reduction shall operate to postpone his future increments and if so, to what extent. In such cases, the seniority of the person concerned remains unaffected”.

The most important provision contained in this rule is “in such cases, the seniority of the person concerned remains unaffected”.

Therefore, we find that there is considerable force in the contention of Mr. Kar that despite the punishment awarded to the petitioner in reducing him to a lower rank the promotional prospects and the seniority of the petitioner would remain unaffected and therefore, the petitioner should be treated as senior to the opposite party No. 3.

On the other hand, it was contended by the Learned Additional Standing Counsel and the counsel appearing for opposite party No. 3 that at the time when the Departmental Promotion Com-

mittee had met and considered promotion of the different incumbents, the petitioner was undergoing the sentence imposed on him and, therefore, the D. P. C. very rightly, though that opposite party No. 3 was senior to the petitioner and, therefore, according to the views expressed by the D.P.C. the opposite party No. 3 having been promoted then and counted as senior to the petitioner should not be now disputed.

While considering this argument of the Learned Counsels appearing for the opposite parties one cannot lose sight of the fact that in the gradation list of the staff of the circle office (vide Annexure V), it has been mentioned that one permanent post of Head Clerk had been kept vacant and against item No. 4 under the heading ‘LSG officers’ the name of Mr. B.C. Patnaik (meaning the petitioner) has been mentioned. Presumably, the post was intended to be given to the petitioner after the order of the disciplinary authority reducing the petitioner to the lower rank had spent its force. The D.P.C. that recommended petitioner’s promotion had actually taken up a consideration that had been deferred by the earlier D.P.C.

Therefore, in view of the aforesaid facts and circumstances and in view of the clear provisions contained in the rule quoted above, we find no merit in the contention of the learned counsel appearing for the opposite parties.

Hence, it is ordered that Shri B.C. Patnaik the petitioner is to be treated as confirmed in the L.S.G. grade with effect from 1. 4. 1968 and be treated as senior



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**K. P. Acharya**

**Member**

**Central Admn. Tribunal**

to Shri S. N. Patnaik, opposite party No. 8 in the said grade. It is further directed that a Departmental Promotion Committee be constituted to consider further promotion of the petitioner

treating him senior to opposite party No. 3.

Thus, the petitions stands allowed but without costs.

Petition allowed.



**K. P. Acharya**  
**Member**  
**Central Admn. Tribunal**

### OBSERVATION

- (i) **Compulsory Retirement—Enquiry officer holding the applicant guilty well as not guilty—The case is of no evidence and order set aside.**
- (ii) **No evidence - The Enquiry officer held that the guilt as alleged could be true— Conclusion is based on mere probabilities - It is a case of no evidence.**
- (iii) **Court's interference in departmental Inquiry—It is well settled that court will not interfere if there is evidence, even if the reasons given by the enquiry officer do not appeal to the court.**
- (iv) **Central Administrative Tribunals Act—Section 20 —Departmental channel not exhausted—Case abmitted by High Court under Art. 226 and transferred to tribunal—Charge on which compulsory retirement was of petty nature— Applicant had already been out of job for nearly two years —Hence case set remitted to department.**

### OBSERVED BY

Mr. K. P. Acharya and Mr. Arun Banerjea  
 Hon'ble Members, Central Administrative Tribunal (Calcutta Bench.)

### IN

TA No. 329 of 1986, decided on 11-4-1986, in the case of Dalip Kr, Roy, Appellant  
 Union of India, Respondent.

### IMPORTANT POINT

*Euen in domestic inquiries the delinquent cannot be convicted merely on suspicion/ probability.*

### TEXT

K. P. Acharya, J. M. The applicant joined the postal department in the year 1957 and had been absorbed as a Class I employee in the said Departments. In the course of time, the applicant was promoted a Postman occupying a Class II post and this was in the year 1962. As a Postman the applicant was posted to Dhakuria Post Office which is said to be within the Baligunj area within the city of Calcutta and the permanent residence of the applicant was in village Dhopagachi within the district of 24 Parganas. The applicant sought to make

out a case that though he was residing in 33 Banerjee Lane at Dhukuria, Calcutta, his children were residing in village Dhopagachi and were receiving education in a school in village Dhopagachi and, therefore, the applicant claimed the requisite allowance or which he was entitled under the Children Education Allowance scheme. In view of the aforesaid nature of case made out by the applicant, a total sum of Rs. 240/- (Rupees Two Hundred and forty) had been drawn by the applicant to wards such allowance for a



period of six months in the year 1980 for two of his children. The Department had some information that a false claim had been made by the applicant stating that he was residing in 33 Banerjee Para Lane whereas according to the department authorities of the applicant the applicant was residing in Dhopagachi with his children and hence the applicant was not entitled to the allowance under the rules and furthermore he had deceived the Department and had drawn an amount to which he was not legally entitled. On the basis of this nature of case of the Department to which the applicant belonged. Article of charges were framed against applicant and a departmental proceeding was initiated against the applicant. After the learned Enquiry officer delivered his findings, the disciplinary authority ordered compulsory retirement of the applicant finding that the case of the prosecution had been proved against the delinquent officer the present applicant.

2. Being aggrieved by this order of compulsory retirement the applicant had invoked the extraordinary jurisdiction of the High Court of Calcutta under Article 226 of the constitution and the matter had been admitted for hearing. In the meanwhile, Administrative Tribunals Act 1985 came into force and hence the matter has been transferred to this Tribunal to be disposed of according to law.

3. The respondents have filed their opposition in reply to the main petition

and therein it is maintained the Article of charges having been satisfactorily proved by the prosecution, the disciplinary authority has taken the appropriate step in awarding the appropriate punishment to which no interference by the Court is necessary when the applicant appeals and, therefore, it is prayed that the application should be dismissed.

4. We have heard Mr. Ashok Sarkar, Learned Advocate appearing for applicant and Sardar Amjed Ali learned Counsel appearing for the respondents at some length. Law is well settled that in cases of departmental enquiry, the Tribunal cannot go into questions of fact mooted on behalf of the aggrieved person but it can only interfere on hands for interference where it is a case of on evidence. This cardinal principle has been laid down by the Supreme Court in the case of Union of India v. H.C. Goel. AIR 1964 S.C. 364. Their Lordships were pleased to observe as follows:—

“This conclusion does not dispose of the appeal. It still remains to be considered whether the respondent is not right when he contends that in the circumstances of this case, the conclusion of the Government is based on no evidence whatsoever. It is a conclusion which is perverse and, therefore, suffers from such an obvious and patent error on the face of the record that the High Court would be justified in quashing it. In



K. P. Acharya

Member

Central Admn. Tribunal

dealing with writ petitions filed by public servants who have been dismissed, or otherwise deals with so as to attract Art. 311 (2), the High Court under Art. 226 has jurisdiction to enquire whether the conclusion of the Government on which the impugned order of dismissal rests is not supported by any evidence at all. It is true that the order of dismissal which may be passed against a Government servant found guilty of misconduct, can be described as an administrative order; nevertheless, the proceedings held against such a public servant under the statutory rules to determine whether he is guilty of the charges framed against him are in the nature of quasi-judicial proceedings and there can be little doubt that a writ of certiorari, for instance, can be claimed by a public servant if he is able to satisfy the High Court that the ultimate conclusion of the Government in the said proceedings, which is the basis of his dismissal is based on no evidence. In fact, in fairness to the learned Attorney General, we ought to add that he did not seriously dispute this position in law."

5. In view of the aforesaid dictum laid down by their Lordships, the Tribunal is now required to find out whether the domestic enquiry out of which the present case arises and sought to be assailed by the Learned Counsel, Mr. Sarkar consists some evidence which has been upto the satisfaction of the en-

quiring officer or the disciplinary authority. Law is equally well settled that even if the reasonings assigned by the enquiring officer in coming to its own conclusions may not be appealing to the court and there is a possibility of taking a different view on questions of fact other than taken by the enquiring officer, yet the court would have no power to disturb the finding except in those cases where it can be conclusively said that there is no evidence. Therefore, it would be very much relevant to consider the finding of the learned enquiring officer. The findings are mentioned in Annexure 'E' to the writ application and at page 46 of Annexure 'E' the learned enquiring officer has arrived at his final conclusion which runs :—

From the foregoing paragraphs it will be seen that though it could not be clearly established that Shri Dilip Ray was not a tenant of 33 Banerjee Para Lana, Calcutta-31, yet the evidence produced and examined during enquiry shows the probability that Shri Roy was not a tenant of the said premises".

6. In my opinion the learned enquiring officer has tried to blow hot and cold in the same breath. In one strain the learned enquiring, Officer states that the prosecution had failed to establishing its case that the applicant was not residing as a tenant in 33 Banerjee Para Lane and in another breath the learned officer states that from the evidence produced and examined during the enquiry, the case of the prosecution has been



probabilised and due to such probaility, he comes to the conclusion that the applicant was not a tenant of 33 Banerjee Para Lane. In this connection, I would like to refer to the observations of their Lordships in the case of Union of India v. H.C. Goel (Supra).

Their Lordships have also been pleased to lay down as follows ;

“Though we really appreciate the anxiety of the appellant to root out corruption from public servant, we cannot ignore the fact that in carrying out the said purpose more suspicion or probaility should not be allowed to take the place of proof in domestic enquiries. It may be that the technical rules which govern criminal trials in court may not necessarily apply to disciplinary proceedings but nevertheless the principles that in publishing the guilty, scrupulous care must be taken to see that the innocent are not punished applies as much to regular criminal trials as to disciplinary enquiries held under statutory rules.”

From the above dictum laid down by their Lordships it is crystal clear that even in domestic enquiries the delinquent cannot be convicted merely on suspicion/probability. There must be satisfactory evidence to come to an irresistible conclusion that the prosecution has proved his case against the delinquent officer with satisfactory evidence.

7. Applying the principles laid down by their Lordships in the above quoted judgement to the facts of the present

case one would find that the learned enquiring officer (if I may repeat) in one strain conclusion that the prosecution has failed to establish that applicant was not a tenant in 33 Banerjee Lane and in another strain he drives himself to a conclusion that the evidence adduced before him probabilised the case of the prosecution which has been clearly denounced by the Supreme Court in the above mentioned judgement.

8. Therefore, in view of the findings and the conclusion arrived at by the learned enquiring officer we have least hesitation in our mind to conclude that this is a case where there is no evidence to bring home the charge satisfactorily against the delinquent officer and, therefore, the enquiry report and the final order passed by the disciplinary authority is bound to be quashed.”

9. Before we pass a final order, one point was raised by the learned counsel for the respondents. Mr. Ali that without exhausting the remedies available to the applicant by way of appeal. it was unjustified on the part of the applicant to rush to the court and especially in view of the fact that Section 20 of the Administrative Tribunal Act created a bar for the Tribunal to admit any matter without the remedies being exhausted and therefore this application should be dismissed. True Section 20 of the Administrative Tribunals Act contemplates that the Tribunal shall not originally admit an application without remedies being exhausted. But, so far as the present applicant, is concerned, it was under Article 226 of



**K. P. Acharya****Member****Central Admn. Tribuna**

Constitution filed in the High Court and the learned Judge of the High Court had admitted this case of hearing and the provisions contained under the Administrative Tribunals Act would have no application to the present case because it was filed in the year 1984. True it is that Courts at times have fact inclined to hear a particular applicant after the remedies are exhausted but it was not disputed that there are bed roll of judgments of High Courts and that of the Supreme Court where protection has been given to a particular aggrieved person even if that particular person has not exhausted the remedies because of peculiar facts and circumstances involved in that particular case. Though we have taken a serious note of the aforesaid submission of the learned Counsel, Mr. Ali and though we could have dismissed the application for other remedies not having being exhausted yet keeping in view the fact that there being no evidence in this particular case and if conceding for the sake of argument the case of the prosecution was true, a paltry amount of Rs. 240/- (Rupees Two hundred and Forty) being involved did not think it prudential/worthwhile/justified in making the applicant to face further hazards especially when he has been deprived of his bread for such a long period. Therefore, keeping in view these peculiar facts and circumstances involved in this case, we did not think it justified to accept the aforesaid submission of the learned

Counsel Mr. Ali.

10. In view of the aforesaid discussions and the findings given by us the charges/enquiry report/final order of the disciplinary authority compulsorily retiring the applicant are hereby set aside and it is directed that the applicant be put into service with effect from the date on which he was compulsorily retired. Thus the application stands allowed but without costs.

Arun Banerjea, Member. While I agree to the above mentioned findings and conclusions of my learned Brother, I would like to put on record the fact that the applicant did not chose to go for a departmental appeal. I entirely agree with the finding the punishment awarded is far too harsh, even if the facts of allegations are fully established. Under the circumstances, I feel that the concerned departmental authorities would have this case Sympathetically on appeal. Accordingly, I would have liked to remand this case back to the Department. However, I am resisting from ordering such a course in view of the fact that the applicant has already suffered for nearly two years of unemployment. Deferring admission on the case further would result in additional harassment.

Under the circumstances, I agree with my learned Brother that the Disciplinary proceedine be quashed and the applicant be reinstated in his service.

Application allowed.

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NO MASTER BUT THE LAW



## OBSERVATION

**Industrial Disputes Act 1947 as amended in 1982—Section 17-B Ingredients of.**

**I. D. Act, 1947 (as amended in 1982) Section 17-B—When can the benefit of section 17-B be denied to a workman.**

**Interpretation of Statutes—“Purpose of objects and Reasons”.**

**Interpretation of Statutes—For positive interpretation—Court's Duty.**

**I. D. Act 1982 Section 17-B—Benefit of the provisions must be given in case of an award which had become final even though the award was made prior the incorporation of the Section.**

## OBSERVED BY

Mr. V. Khalid and

Mr. G. L. Oza

Hon'ble Judges, Supreme Court of India

## IN

C. A. 1251 of 1986 (C. M. 4006/1984 of Delhi High Court) decided on 4-4-1986, in the case of Bharat Singh, Appellant v. Management New Delhi Tuberculosis Centre and ors. Respondents.

## IMPORTANT POINT

*Where the new statute only gives recognition to an already prevailing power of the courts, it can be interpreted to have retrospective effect also.*

## TEXT

Khalid, J. :—Section 17-B was inserted in the Industrial Disputes (Amendment) Act, 1982 (Act 46 of 1982) This received the assent of the president on August 31, 1982. It was directed that the commencement of the Act would be on such date as the Central Government may, by a Notification in the Official Gazette, appoint. The Central Government appointed the 21st day of August, 1984, as the date on which the Act would come into force. The question that falls

to be decided in this appeal by special leave by the workman is, whether Section 17-B applies to awards prior to 21st day of August, 1984. The Delhi High Court held, in the Judgement under appeal, that the section applied only to awards that were passed subsequent to the coming into force of this Section, namely 21st August, 1984.

2. The appellant joined the Management of New Delhi Tuberculosis Jawaharlal Nehru Marg, New Delhi, as a peon



against a permanent regular post. He was thereafter promoted as a Daftry. By a Memorandum dated September 13, 1975, the Management informed the appellant that his services were not required with effect from September 13, 1975 afternoon and his services were thus terminated : He was paid one month's salary in lieu of notice. The appellant kept quite for three years, obviously because the Management Hospital, as per the law as it then stood, was not an industry. It was in the year 1978, that this Court gave the Judgement in Bangalore Water Supply case. Subsequent to that the appellant raised an industrial dispute. The Delhi Administration, as per its Order dated August, 6, 1969 referred the following dispute dispute for adjudication :

“whether termination of the services of the workman Shri Bharat Singh is justified and/or illegal, and if so to what relief is he entitled?”

The presiding Officer of the Labour Court, in his award dated September 28, 1983, held that the termination of the services of the appellant was wrongful and illegal and that he was entitled to be reinstated with continuity of service. The Labour Court directed that the appellant would be entitled to back wages with effect from 19th May, 1979 only, at the rate at which he was drawing then when his services were terminated. The award was published in the Gazette by Notification dated November 2, 1983.

3. On January 31, 1984, the Management moved the Delhi High Court,

under Article 226 of the Constitution of India challenging the award and applied for stay of the operation of the award. The High Court directed stay of the operation of the award, during the pendency of the writ petition on condition that the Management deposited 25 per cent of the amount as determined by the Labour Court, Delhi, in respect on the back wages. The High Court permitted the appellant to withdraw the amount on furnishing security ; (we are told that the amount was not withdrawn by the appellant since he could not furnish security) On December 12, 1984, the appellant moved an application under Section 17-B of the Act read with Section 151 of the Code of Civil Procedure, for a direction to the Management to pay him full wages last drawn by him, during the pendency of the writ petition. His case was that Section 17-B mandated the Court to pay full wages if the conditions in that Section were satisfied. This was opposed by the Management. The High Court after considering the rival contentions came to the conclusion that Section 17-B had applications only to cases where the awards were passed after the commencement of Section 17-B ; in other words, after August 21, 1984, and that since the award in this case was prior to August 2, 1984, it has no application. Accordingly, the High Court dismissed the petition filed by the workman. Hence this appeal by special leave at the instance of the workman.

4. We are have concerned only with the interpretation of Section 17-B. The appellant's learned counsel relied



upon a decision of this Court in *Rustom & Horns by (1) Ltd. v. T.B. Kadam* (1976) 1 S.C.R. 119 where this Court construed the language of Section 2-A of the Act; while the learned counsel for the Management strongly relied upon two decisions of this Court which construed the language of Section 11-A and which according to him, was in *pari materia* with Section 17-B. The cases are *Workmen of Firestone Tyre & Rubber Co. of India, Pvt. Ltd. v. The Management and Others* (1973) 3 S.C.R. 587 and *Gujarat Mineral Development Corporation v. Shri P.H. Brahmbhatt* (1974) 2 S. C.R. 128.

5. Before we deal with the rival contentions, it would be useful to read Section 17-B with which we are concerned.

“17B. Where in any case, a Labour Court, Tribunal or National Tribunal by its award directs reinstatement of workman and the employer prefers any proceedings against such award in a Higher Court or the Supreme Court, the employer shall be liable to pay such workman, during the period of pendency of such proceedings in the High Court or the Supreme Court, full wages last drawn by him, inclusive of any maintenance allowance admissible to him under any rule if the workman had not been employed in any establishment during such period and an affidavit such work man had been filed to that effect in such Court:

Provided that where it is proved to the satisfaction of the High Court

or the Supreme Court such workman had been employed and had been receiving adequate remuneration during any such period or part thereof, the Court shall order that no wages shall be payable under this section for such period or part, as the case may be.”

The three necessary ingredients for the application of this Section are (i) the Labour Court should have directed reinstatement of the workman, (ii) the employer should have preferred proceeding against such award in the High Court or in the Supreme Court, (iii) that the workman should not have been employed in any establishment during such period.

6. The question now before us is whether a workman would be denied the benefit of this Section, even if all the above three conditions are satisfied, if the award was prior to August 21, 1984? We may even at this stage, say that in cases where the award had become final prior to August 21, 1984, Section 17-B cannot be pressed into service to reopen the same. It is only when the award is challenged and the challenge is pending, that the Section becomes operative.

7. It is common knowledge that even before Section 17-B was enacted, Courts were, in their discretion, awarding wages to workmen when they felt such a direction was necessary but that was only a discretionary remedy depending upon Court to Court. Instances are legion where workmen have been dra-



gged by the employers in endless litigation with preliminary objections and other technical pleas to tire them out.

A fight between a workman and his employer is often times an unequal fight. The legislature was thus aware that because of the long pendency of disputes in Tribunals and Courts, on account of the dilatory tactics adopted by the employer, workmen had suffered. It is against this background that the introduction of this Section has to be viewed and its effects considered.

8. The objects and reasons for enacting the Section is as follows:

“When Labour Courts pass award of reinstatement, these are often contested by an employer in the Supreme Court and High Courts. It was felt that the delay in the implementation of the award causes hardship to the workman concerned. It was, therefore, proposed to provide the payment of wages last drawn by the workman concerned, under certain conditions, from the date of the award till the case is finally decided in the Supreme Court of High Courts.”

9. The objects and reasons given an insight into the background why this Section was introduced. Though objects and reasons cannot be the ultimate guide in interpretation of statutes, it often times aids in finding out what really persuaded the legislature to enact a particular provision. The objects and reasons here clearly spell

out that delay in the implementation of the awards is due to the contests by the employer which consequently cause hardship to the workmen. If this is the object, then would it be in keeping with this object and consistent with the progressive social philosophy of laws to deny to the workmen the benefits of Section simply because the award was passed, for example just a day before the Section came into force? In our view it would be not only defeating the rights of the workman but going against the spirit of the enactment. A rigid interpretation of this Section as is attempted by the learned counsel for the respondents would be rendering the workman worse off after the coming into force of this Section. This section has in effect only codified the rights of the workmen to get their wages which they could not get in time because of the long drawn out process caused by the methods employed by the Management. This Section, in other words, gives a mandate to the Courts to award wages if the conditions in the Section are satisfied.

10. In interpretation of statutes, Courts have steered clear of the rigid stand of looking into the words of the Section alone but have attempted to make the object of the enactment effective and to render its benefits into the person in whose favour it is made. The legislators are entrusted with the task of only making laws. Interpretation has to come from the Courts. Section 17-B on its terms does not say that it would bind awards passed before the



V. Khalid

Judge

Supreme Court of India

date when it came into force. The respondents' contention is that a Section which imposes an obligation for the first time, cannot be made retrospective. Such sections should always be considered prospective. In our view, if this submission is accepted, we will be defeating the very purpose for which this Section has been enacted. It is here that the Court has to evolve the concept of purposive interpretation which has found acceptance whenever a progressive social beneficial legislation is under review. We share the view that where the words of a statute are plain and unambiguous effect must be given to them. Plain words have to be accepted as such but where the intention of the legislature is not clear from the words or where two constructions are possible, it is the Court's duty to discern the intention in the context of the background in which a particular Section is enacted. Once such an intention is ascertained the Courts have necessarily to give the statute a purposeful or a functional interpretation. Now it is trite to say that acts aimed at social amelioration giving benefits for the have-nots should receive liberal construction. It is always the duty of the Court to give such a construction to a statute as would promote the purpose or object of the Act. A construction that promotes the purpose of the legislation should be preferred to a literal construction. A construction which would defeat the rights of the have-nots and the underdog and which would lead to injustice should always be avoided. This Section was intended to benefit the workmen in certain

cases. It would be doing injustice to the Section if we were to say that it would not apply to awards passed a day or two before it came into force.

11. The learned Counsel for the appellant invited our attention to a decision of this Court in *Rustom & Hornsby (I) Ltd. v. T. B. Kadam*, where this Court was considering the scope of Section 2-A of the Act. Section 2-A provides thus :

“Where any employer discharges, dismisses, retrenches or otherwise terminates the services of an individual workman, any dispute or difference between that workman and his employer connected with, or arising out of, such discharge, dismissal, retrenchment or termination shall be deemed to be an industrial dispute notwithstanding that no other workman nor any union of workmen is a party to the dispute.”

Before this section was enacted, there was a bar for individual workman to raise an industrial dispute. It was this bar that the management put forward in that case.

12. It was contended that the reference was bad since the dismissal took place before December 1, 1965, on which date the Section came into force. This Court did not accept this plea. The appellant's counsel submits that Section 2-A and Section 17-B are more or less similar in their phraseology and when this Court gave Section 2-A retrospectivity, Section 17-B should also be treated alike. This is what this Court said while dealing with Section 2-A:



“When the Section uses the words ‘where any employer discharges, dismisses, retrenches or otherwise terminates the services of an individual workman, it does not deal with the question as to when that was done; it refers to a situation or a state of affairs. In other words where there is a discharge, dismissal, retrenchment or termination of service otherwise the dispute relating to such discharge, dismissal, retrenchment or termination of service becomes an industrial dispute. It is no objection to this to say that this interpretation would lead to a situation where the disputes would be reopened after the lapse of many years and referred for adjudication under Section.

The question of creation/new right by Section 2-A is also not very relevant. Even before the introduction of Section 2-A a dispute relating to an individual workman could become an industrial dispute by its being sponsored by a labour union or a group of workmen. Any reference under Section 10 would be made only sometime after the dispute itself has arisen. The only relevant factor for consideration in making a reference under Section 10 is whether an industrial dispute exists or is apprehended. There cannot be any doubt that on the day the reference was made in the present case, an industrial dispute as defined under Section 2-A did exist.”

13. The appellant’s counsel relied upon the above observation and contended that even though the words used are in the future tense, denoting something to happen in future, the Section

was held to operate retrospectively also and that similar is the case with section 17-B. The learned counsel for the respondents met this argument with the plea that Section 2-A was only a definition Section and no support could be drawn from the above judgement for the purpose of this case. In our view the principle, laid down in the above decision, cannot be dismissed so lightly, because this Court extended the benefit of this Section to a dispute that existed before the Section came into force, notwithstanding the fact that the Section used future tense regarding the dispute. We agree that Section 2-A is a definition Section. Still this Court gave it a retrospective construction. We feel, some support is available to the appellant from this decision.

14. The respondental counsel relied heavily upon two decisions of this Court, referred above, dealing with Section 11-A of the Act. Section 11-A read as follows :

“Where an industrial dispute relating to the discharge or dismissal of a workman has been referred to a labour Court, Tribunal or National Tribunal/for Adjudication and in the course of the adjudication proceedings, the Labour Court, Tribunal or National Tribunal, as the case may be, is satisfied that the order of discharge or dismissal was not justified, it may, by its award, set aside the order of discharge or dismissal and direct reinstatement of this workman on such terms and conditions, if any, as it thinks fit, or given such



other relief to the workman including the award of any lesser punishment in lieu of discharge or dismissal as the circumstances of the case may require;

Provided that in any proceeding under this section the Labour Court, Tribunal or National Tribunal, as the case may be shall rely on the materials on record and shall not take any fresh evidence in relation to the matter.”

By this Section, Tribunals were conferred with a new jurisdiction. The question arose whether this jurisdiction conferred for the first by Section 11-A, could be extended retrospectively. While dealing with Section 11-A, this Court stated as follows in *Workman of Messers Firestone Tyre & Rubber Co. of India Pvt Ltd. v. The Management and Other*.

“...We have pointed out that this position has now been changed by Section 11-A. The section has the effect of altering the law by abridging the rights of the employer inasmuch as it gives power to the Tribunal for the first time to differ both on a finding of misconduct arrived at by an employer well as the punishment imposed by him. Hence in order to make the section applicable even to disputes, which has had been referred prior to the coming into force of the section, there should be such a express and manifest indication in the section. There is no such express indication. An inference that the section applies to

proceedings, which are already pending, can also be gathered by necessary intendment. In the case on hand, no such inference can be drawn as the indications are to the contrary. We have already referred to the proviso to section 11-A which states in any proceeding under this section’. A proceeding under the section can only be after the section has come into force. Further the section itself was brought into force some time after the Amendment Act was passed. These circumstances as well as the scheme of the section and particularly the wording of the proviso indicate that section 11-A does not apply to disputes which had been referred prior to 15-12-1971. The Section applies only to disputes which are referred for adjudication on or after 15-12-1971. To conclude, in our opinion, section 11-A has no application to disputes referred prior to 15-12-1971. Such disputes have to be dealt with according to the decisions of this Court already referred to.....”

This Court approved this conclusion in *Gujarat Mineral Development Corporation v. Shri P. H. Brahmhatt* thus :

“.....The next question is whether Section 11-A of the Act is applicable to this case. That Section provides that where an industrial dispute relating to the discharge or dismissal of a workman has been



referred to a Labour Court. Tribunal or National Tribunal for adjudication and in the course of the adjudication proceedings, the Labour Court, Tribunal or National Tribunal as the case may be, is satisfied that the order of discharge or dismissal was not justified, it may by its award, set aside the order of discharge or dismissal and direct reinstatement of the workman on such terms and conditions, if any as it thinks fit, or give such other relief to the workman including the award of any lesser punishment in lieu of discharge or dismissal as the circumstances of the case may require. We are, however, not concerned with the several question which may arise thereunder, because the section itself will not apply to an industrial dispute referred prior to December 15, 1971, when section 11-A was brought into operation. It was held by this Court in the Workmen of M/s Firestone Tyre & Rubber Co., or India (Pvt.) Ltd. v. The Management and others (1978- I. L. L. J. 278) that this section has no retrospective operation on the pending references.....”

15. According to the respondents’ counsel, these two decisions clearly cover the question involved in this appeal also. We feel that this submission cannot be accepted for more than one reason. Section 11-A, confers a jurisdiction on the Labour Court, Tribunal or National Tribunal to act in a particular manner which jurisdiction it did not have prior

to the coming into force of Section 11-A. This the reason why this Court held that Section 11-A cannot apply to proceedings before it came into force. The conferment of a new jurisdiction can take effect only prospectively except when a contrary intention appears on the face of the statute. Section 11-A plainly indicates its prospective operation. This is made clear in the proviso to the section when it say “provided that in any proceeding under this Section”. This can only mean something relatable to a stage after the Section came into being. That is not the case with Section 17-B Here it is not the conferment of a new jurisdiction but the condification in statutory form of a right available to the workman to get back-wages when certain given conditions are satisfied. There are no words in the Section to compel the Court to hold that it cannot operate retrospectively. Before Section 17-B was introduced there was no bar for Courts for awarding wages. Of course the workman had no right to claim it. This Section recognizes such a right. To construe it in a manner detrimental to wokmen would be to defeat its object.

16. In our considered view, therefore the High Court was in error in holding that the legislature did not intend to give retrospective effect to Section 17-B. We hold that Section 17-B applies even to awards passed prior to August 21, 1984, if they have not become final. We set aside the judgement of the High Court and allow this appeal with costs, quantified at Rs. 3000/-



**D. V. Sehgal****Judge****Punjab & Hary. High Court****OBSERVATION**

**Tacit approval - Petitioner appointed ad hoc by CMO as Ward Servant — Promoted ad hoc as Store Keeper Worked as such for several years and his promotion as such approved by Director Health Services—Rules made for regulation of services of those appointed initially by Director Health and had one year experience Petitioner reverted due to both deficiencies—Held the Director Health Service by approving his promotion tacitly approved his appointment—As regards experience, he acquired it while in service Reversion set aside.**

**OBSERVED BY****Mr. D. V. Sehgal****Hon'ble Judge, Punjab & Harayana High Court****IN**

**C. W. P. 1220/1979, decided on 24-1-1986, in the case of Tarsam Lal Arora, Petitioner v. State of Punjab, Respondent.**

**IMPORTANT POINT**

**When the promotion was approved by competent authority, fault in initial appointment by lower authority is tacitly rectified.**

**TEXT**

**D. V. Sehgal, J. :—The petitioner was appointed as Ward Servant in October, 1964, in the M. D. Hospital, Moga, through the agency of Employment Exchange. He has passed the Higher Secondary Examination with Science as one of the subjects. He was appointed as Store Keeper on purely temporary basis for six months by the Chief Medical Officer, Ferozepur, vide order dated 1-11-86 Annexure P. 1, or till the date a candidate recommended by the Subordinate Services Selection Board, Punjab was appointed in the said hospital, whichever was earlier. The Chief Medical Officer, Ferozepur, made a reference to the Director Health Services, Punjab, vide letter dated 22-11-1967 Annexure p. 2 for allowing the petitioner to continue temporarily in service beyond six months. This permission was granted by**

**the latter vide dated 17-4-1968 Annexure p. 3 on the condition that he should deposit cash security of Rs. 500/- in the post office pledged in favour of the Chief Medical Officer, Ferozepur, and should give personal surety of Rs. 1000/- under rule 3.5 of the Sub Treasury Rules, which was duly complied with. The Chief Medical Officer again recommended vide his letter dated 3-7-1970 Annexure p. 4 that keeping in view the satisfactory work and conduct he should be allowed to continue in service as Store Keeper. It appears that the Director, Health Services, vide letter dated 6-2-1970 Annexure p. 5 had allowed him to continue in service on the conditions already laid down. A copy of this letter was, however, forwarded to the Senior Medical Officer under whom he was working,**



vide endorsement dated 28-8-1970. The petitioner, thus, continued working as such till 1-10-1975 when Civil Surgeon Faridkot, reverted him to the post of Ward Servant. On a representation made by him, the Director Health and Family Planning, Punjab, vide order dated 23-7-1976 set aside the order of reversion and he was posted as Store Keeper in the office of the Principal Medical Officer, Sunder Nagar, against a vacant post. It is not in dispute that since then the petitioner has been continuing on the post of Store Keeper.

2. As order of the President of India dated 3-5-1977 Annexure P. 7 issued directions to the effect that ad hoc employees who had been employed through the employment exchanges and by an authority competent to make appointments and who had completed a minimum of one year's service on 31-3-1977 should be appointed in the service on regular basis with effect from 1-4-1977 provided they fulfil the academic qualifications including experience, if any prescribed for the posts as also the condition of age at the time of the first appointment as such. The services of the petitioner were, however, not regularised in accordance with directions contained in Annexure P. 7 by the Regularisation Committee as communicated vide office order dated 26-3-1979 Ann. P. 8 of the Director Health and Family Welfare, Punjab, on the ground that he did not possess the requisite qualifications/experience initially for the post of Store Keeper. He, therefore, challenged the order Annexure P. through the present writ petition.

3. It was contended by the learned counsel for the petitioner that the requisite qualification for the initial appointment as Store Keeper was Matric/Higher Secondary or its equivalent. The Director Health and Family Welfare, Punjab who filed the written statement on behalf of the respondents, however, contended that besides the above academic qualifications, one year's experience in handling and maintenance of store and stock keeping preferable of a Government concern was also a requisite qualification. According to him the appointing authority of a Store Keeper was the Director but the petitioner had been appointed initially by the Chief Medical Officer. The order Annexure P. 8 was, thus, justified.

4. Having heard the learned counsel for the parties. I have reached the conclusion that this petition must succeed. No doubt, the petitioner was originally appointed as Store Keeper by the Chief Medical Officer, Ferozepur, but his appointment as such was approval and continued by the Director, Health Services Punjab, vide order Annexures P. 3 and P. 5, and when he was reverted to the post Ward Servant, his reversion was set aside again by the Director vide his order Annexure P. 6. It is thus clear that the appointment of the petitioner as Store Keeper was made with the tacit approval of the Director, who was the appointing authority. The lack of the condition of experience at his initial appointment as Store Keeper on 1-11-1986 loses significance for the simple reason that by 1-11-1967 he had already acquired the requisite experience



**D. V. Sehgal****Judge****Punjab & Hary. High Court**

and ad hoc service was continued from time to time subsequent thereto with the approval of the Director. Even if the appointment for lack of experience was irregular at the initial stage, on his acquiring experience of one year as Store Keeper he became eligible for regular appointment. For this view, I find support from Ram Sarup v. State of Haryana and others.

5. Consequently, this petition is allowed with costs, the order dated 26-3-1979 Annexure p. 8 is quashed and the respondent is directed to regularise the services of the petitioner with effect from 1.4.1977 in accordance with the directions contained order Annexure p.

7. The costs are assessed at Rs. 200/-

Petition allowed.



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TO OBEY  
NO MASTER BUT THE LAW



**S. P. Mukerji**  
**Member**  
**Central Admn Tribunal**

### OBSERVATION

(i) **Seniority—Ad hoc appointment followed by regularisation without any break—Will the ad hoc period count for seniority for promotion—(Yes)**

(ii) **Ad hoc appointment due to non-finalisation of service rules—Converted into regular one immediately when rules were made—No Break—Whole period will count for seniority—Ad hoc service cannot be ignored.**

### OBSERVED BY

Mr. S. P. Mukerji and  
Mr. H. P. Bagchi  
Hon'ble Members, Central Administrative Tribunal (Delhi Bench).

### IN

T. A. No. 1129/1985, decided on 11-7-1986, in the case S. C. Jain, Petitioner v. Union of India & Ors, Respondents.

### IMPORTANT POINT

*Once an ad hoc employee receives entry in the seniority and eligibility list, he automatically derived his right to count his continuous service prior to its regularisation, for the purpose of seniority.*

### TEXT

S. P. Mukerji, A.P. Bagchi, Judicial Member :—The petitioner who was working as Technical Assistant in the Office of the Director, National Institute of Communicable Diseases under the Ministry of Health and Family Welfare had moved the Hon'ble High Court of Delhi on 8-5-1985 with a writ petition under Article 226 of the Constitution of India praying that he should be declared senior to Respondent No. 4 and thereby he should be appointed as Superintendent by quashing the order of promotion of Respondent No. 4 to that post. He has also prayed that the Memo dated 30-1-1985 issued by the Director of the Institute rejecting his representation should also be quashed. The petition stands transferred to the Tribunal under Section 29 of the Administrative Tribunal Act. Brief material

facts of the case which are not in dispute can be summarised as follows.

2. The Petitioner started his career in the Institute as an Accountant in the scale of Rs. 80-220 (revised to 130-300 with effect from 1-7-1959) and was promoted as Technical Assistant in the scale of Rs. 210-425 on an ad hoc basis with effect from the forenoon of 29-12-1972. appointment was on ad hoc basis as the Recruitment Rules for the post of Technical Assistant had not been finalised. When the Recruitment Rules were finalised on 30-12-1978, the petitioner's appointment was regularised as Technical Assistant with effect from 30-12-1978 itself. He was confirmed as Technical Assistant on 1-5-1985.

3. As against this, Respondent No. 4 Shri Ram Prakash started his



career as an Accountant-cum-Cashier in the National Fitness Cops under the Ministry of Finance on 16-10-1959 and was promoted as Head Clerk in the scale of 210-380 on a regular basis with effect 6-6-1982. When that post was declared to be surplus he was transferred the Surplus Cell under the Department of personnel & A. R. on 1-7-1972 and on the afternoon of 29-12-1972 he was appointed as Head Clerk on a regular in the National Institute of Communicable Diseases (NICD) where the Petitioner was also promoted as Technical Assistant from the forenoon of that very day. The Respondent No. 4 was confirmed Head Clerk with effect from 1-1-1980.

4. The tie started between the Petitioner and Respondent No. 4 when the post of Superintendent in the NICD fell vacant. In accordance with the Recruitment Rules for the post of Superintendent, Head Clerk and Technical Assistants with five years of regular service were eligible. In accordance with the same rules, the post was a non-selection post, that is it was to be filled up on the basis of seniority subject to the rejection of the unfit. The Departmental promotion Committee met on 30-1-1982 and considered the cases of both the Petitioner as well as Respondent No. 4 and recommended to await a decision on the representation which the Petitioner had filed with the Director General of Health Service claiming that he was senior to the Respondent No. 4. The D.G.H.S. decided the representation of the Petitioner against him and informed the NICD on 19-6-1982 that Respondent No. 4 may be

treated as Senior to the petitioner. It appears that the Director of NICD had some reservations about D.G.H.S.'s decision but the D.G.H.S. pressed upon him on 18-11-1983 to issue order of promotion of Respondent No. 4 immediately, under intimation to his office. Accordingly, orders of ad hoc appointment of Respondent No. 4 as Superintendent with effect from 19-11-1983 were issued. Later, another order was issued preponing the promotion of Respondent No. 1 to 3, respondent No. 4 had been 'informally' discharging the duties of the Superintendent from 1981 itself. This fact is challenged by the Petitioner who claims that it was he who had been discharging the duties of Superintendent.

5. We have heard the arguments of the learned counsel for both the parties and gone through the documents carefully.

6. The basic question to be decided is the inter-seniority between the Petitioner as Technical Assistant and Respondent No. 4 as Head Clerk. The pay scale of Technical Assistant is admittedly Rs. 210-425 in accordance with the Memorandum of the 29th December, 1972 (Annexure P-II to the petition) whereas the pay scale of the Head Clerk is 210-380 in accordance with the order of 15th December, 1968 (Annexure R-III to the additional affidavit filed by the petitioner). Thus the post of Technical Assistant is a shade higher than that of the Head Clerk. It is also admitted that whereas the petitioner was promoted as Technical Assistant, though in an ad hoc capacity from the forenoon of 29-12-1972, the



**S. P. Mukerji****Member****Central Admn. Tribunal**

respondent No. 4 was appointed as Head Clerk with effect from the afternoon of that very day. If we do not make any distinction between ad hoc and regular appointment for purpose of seniority the petitioner having been promoted earlier as Technical Assistant should Legitimately be senior to respondent No. 4. The question which has been raised repeatedly and vehemently by the Respondents is that ad hoc service should not count for seniority or confirmation. It admitted that the Petitioner was appointed as Technical Assistant on an ad hoc basis with effect from 29-12-1972 merely because the Recruitment Rules for that post had not been framed by then. When the Recruitment Rules were finalised on 30-12-1971, the Petitioner's appointment was straightaway regularised with effect from that very day, it has been held by the Hon'ble High Court of Delhi in Kuldeep Chand Sharma and another v. Delhi Administration and another 1978 (2) S.L.R. Page 379 that once an ad hoc appointee is eventually selected for the post in a regular selection on framing of Recruitment Rules the regular appointment would relate back to the date of ad hoc appointment. We can do no better than quote verbatim the relevant portions from the judgement itself :—

“Whether any rights flow from the order of September 7, 1976 by which the petitioners were appointed on purely temporary, emergent and ad hoc basis for a specified period or till further orders which could be enforced in the present proceedings is the first question that calls for consideration. True,

an ad hoc appointment is in the nature of a stop gap arrangement, made for a variety of reasons, on account of which it is not possible to make a regular appointment. It may be that the Rules under which a regular appointment has to be made have yet to be framed because the regular incumbent is not available or the process for regular selection involves time and the exigencies are such that the posts cannot be allowed to remain unmanned meanwhile Such an appointment, however, does not affect the rights of those who were not considered for such appointment, though within the eligibility. In that sense ad hoc appointment does not by itself confer any right on the said appointee for regular appointment to such a post. But it is equally true that once an ad hoc appointee is eventually selected for the post in a regular selection, the regular appointment would relate back to the date of ad hoc appointment.” (Emphasis supplied).

7. The Hon'ble Supreme Court has put the position beyond the pale of any doubt whatsoever in their celebrated judgement in Narendra Chadha v. Union of India and others A.I.R. 1916 SC. 638 in which the entire period ad hoc officiation (even though in excess of promotion quota and without the prior approval of the Union Public Service Commission) followed by regular appointment has been declared to be valid for the purposes of seniority.



8. Based on these findings and the circumstances of the case, we have no doubt whatsoever that the entire period of service as Technical Assistant rendered by the Petitioner with effect from forenoon of 29-12-1972 should count for seniority in that grade.

9. Our stand is vindicated by the fact that admittedly the Departmental Promotion Committee itself which met on 30-1-1982 seemed to have considered the ad hoc service of the Petitioner as regular. In accordance with Recruitment Rules for the post of Superintendent, both Head Clerks as well as Technical Assistants have to put in five year of regular service in these grades. It is also admitted by the Respondents that both Respondent No. 4 and the petitioner were considered by the DPC for the post of Superintendent. The petitioner could not have been considered by the DPC if his ad hoc service had not been considered to be regular. As has been stated earlier the Petitioner's promotion as Technical Assistant was regularised with effect from 30-12-1978 when the Recruitment Rules were finalised. If his service had been counted as regular only from that date, he would have completed only three years and one month of regular service on 30-1-1982 and would thus have been straightaway ineligible for being considered for the post. Since he was considered for the post as eligible, the Respondents and the DPC can be presumed to have reckoned his entire service as Technical Assistant from 30-12-1978 as regular for the purposes of promotion as Superintendent.

10. Logically, therefore, the Respon-

dents, having recognised the petitioner's service from 29-12-1972 as regular for the purpose of eligibility cannot deny him the benefit of that service for seniority also with effect from that day. Even otherwise, the course thus adopted was legally in order and fortified by the decision of the Supreme Court aforesaid.

11. We are not very happy about the manner, in which the office of the DGHS determined that the Respondent No. 4 was senior to the Petitioner and continued to exercise pressure on the NICD for his promotion by overlooking the interests of the Petitioner. We are disturbed by the argument on which the DGHS based on his findings. In his letter dated 26th April, 1983 (Annexure R-16 to the additional affidavit filed by the Respondent No. 4) addressed to the Director of National Institute of Communicable Diseases, the Section Officer referring to the Petitioner stated in para 2 thereof as follows :

“On the other hand, Shri S.C. Jain was appointed to the post of Technical Assistant on ad hoc basis from 29-12-1972 though his ad hoc appointment is being revised from time to time, he has not yet been regularised for the post of Technical Assistant upto now.”

(Emphasis supplied)

The underlined statement given in the letter of 26th April, 1983 quoted above is falsified by the later order dated 28th May, 1984 (Annexure P-III to the petition) by which the Petitioner was regularised as Technical Assistant



with effect from 30th December, 1978. Thus the basis of DGHS's order stood liquidated by the order of 28th May, 1984.

12. Having branded the Petitioner an ad hoc promotee, the Section Officer in the same letter of 26-4-1983 went on to argue as follows—

In accordance with the instructions contained in this Department O. M. No. 9/11/55 RPS dated the 22nd December, 1959 laying down the general principles for determination of seniority of various categories of employees in Central Service, it has been clarified that the seniority of the persons appointed on ad hoc basis will be shown in the order of their ad hoc appointment and below the persons regularly appointed in the grade and such persons will not be eligible for purpose of promotion /confirmation etc. In view of this it may be stated that Shri Jain holding the post of Technical Assistant on ad hoc basis cannot be treated senior to Shri Ram Prakash who is regularly appointed to the post of Head Clerk. Thus, it can evidently be stated that Sri Jain does not fulfil the eligibility conditions contained in the recruitment rules for the post of Superintendent and as such cannot be considered for the above noted post".

The finding of, DGHS, therefore, is based on the supposition (rendered erroneous by later order 28-5-1984) that the

petitioner being an ad hoc promotee not yet regularised belongs to an inferior category and has to be placed below those who are holding similar post in a regular manner.

13 In the same manner of supposition, the DGHS Office in their letter of 13-7-1984 (Annexure R. 28 to the additional affidavit of the Respondent No. 4) quoted the advice of the Department of Personnel & A. R., in the following terms—

"Department of Personnel & A. R. O. M. No. 22011/3/75-Estt (D), dated 29-10-1975, clearly indicates that the persons appointed on ad hoc basis are not eligible for any seniority in the grades concerned and their ad hoc appointment do not entitle them to any claim for promotion/confirmation etc., in the grades or eligibility for promotion to next higher grade.

It may be interesting to note that the Department of Personnel based on the thesis that ad hoc employees are not eligible for any seniority on Consideration or promotion to the higher grade was quoted by the DGHS against the petitioner on 13-7-1984 when the status of the Petitioner had already been elected to that of a regular promotee with effect from 30th December, 1978 by the order issued by the NICD on 20th May, 1984 (Annexure P-III to the petition). Thus it is clear that the advice of the DGHS given in 1983 and 1984 were based on a premise which was rendered untenable by the order of 28th



May, 1984. The effect of the order of 28th May, 1984 regularising the Petitioner's promotion with effect from 30th December, 1978 changed the entire scenario qualitatively. As a regular promotee with effect from 30-12-1978, the petitioner obtained a right to be placed in the same seniority list as Respondent No. 4 and eligible for being considered for the post of Superintendent in 1982. Once he received entry in the seniority and eligibility lists, the Petitioner automatically derived his right to count his entire continuous service prior to its regularisation, for the purposes of seniority and eligibility.

14. We cannot accept the plea of the Respondent No. 4 that in his case his service as Head Clerk from 1962 should be counted for seniority vis-a-vis the Petitioner. This is not only because the Head Clerk's grade was a shade lower than that of Technical Assistant but also because the service of Respondent No. 4 prior to joining NICD was in a different cadre and of had been declared surplus as Head Clerk under the Ministry of Education in that cadre. Even in the seniority list of NICD of Head Clerks, his service as Head Clerk, has been shown as from 29-12-1972 when he joined NICD and not from 1962 when he was in a different cadre. The learned counsel for the Petitioner Stated at the Bar that in accordance with the Ministry of Home Affairs O. M. of 6th February,

1969 redeployed persons from the Surplus Cell count their seniority from the date of redeployment and not earlier. This was not challenged by the Respondents.

15. In the facts and circumstances of the case, we have no doubt in our mind that the petitioner has to be considered senior to Respondent No. 4 by all counts and the contrary finding of Director General of Health Services that Respondent No. 4 is to be deemed to be senior to Petitioner was patently based on facts which became untenable by subsequent orders and on the concept of excluding ad hoc service followed by regular one for the purposes of seniority which concept has been ruled out by recent judgements of the Supreme Court and High Courts. We, therefore, allow the petition and quash the impugned order of 19th November, 1983, 24th February, 1984 (Annexure P-V and P-VI to the petition) and the Memorandum of 30th January, 1985 (Annexure P-IX to the petition). We further declare the petitioner to be senior to Respondent No. 4 and direct that the question of promoting the Petitioner as against Respondent No. 4 as Superintendent on the basis of the seniority so determined should be considered afresh by Respondents No. 1, 2 and

3. There will be no order as to costs.

Petition allowed.



Asha Mukul Pal  
Member  
Central Admn. Tribunal

### OBSERVATION

(i) C.C.S. (C C.A.) Rules, 1965—Rule 14(16) Enquiry Officer did not ask the charged officer his defence after closing case of department—Is it a fatal flaw—(No).

(ii) C C.S. (C.C.S.) Rules, 1965—Rule 14 (15) — One witness who was not cited in the list of witnesses in the charge sheet was examined, an opportunity to cross-examine given to the delinquent— Was there any violation of reasonable opportunity—(No).

(iii) C.C.S. (C C A.) Rules 1965 —Rule 14 (18) —Applicant alleging that his examination by the Enquiry Officer was not adequate—Enquiry officer did put him some questions —No violation occurred.

(iv) C.C.S. (C.C.A.) Rules, 1965 — Rule 14 (18) Written Brief—Delinquent given time to submit brief after getting copy of department's brief—He submitted brief without waiting for department— did it cause him prejudice?—(No). He chose of himself to not to wait.

(v) Proof of documents—Officer preparing statement disproportionate assts could not be produced —Document proved by his clerk—Is it sufficient—(Yes).

(vi) Second Show Cause Notice —Who should serve—Notice served by one who initiated proceedings but competent to impose any major penalty—Contention that he would refer to competent authority only after making up his mind held not correct—Show Cause notice overruled

(vii) Conduct unbecoming of a Govt. servant—Is too generic and is not maintainable.

### OBSERVED BY

Mr. Asha Mukul Pal & Mr. B. Mukhopadhyay  
Hon'ble Members, Central Administrative Tribunal (Calcutta Bench.)

### IN

T. A. 172/1986 (C. R. 7533 W/79), decided on 1-7-1986, in the case Bhagat Singh, Applicant v. U.O.I. and ors., Respondents.

### IMPORTANT POINT

*2nd Show Cause notice is not necessary under the amended Constitution. but if it is served. it must be done by the appropriate authority.*

### TEXT

Asha Mukul Pal, Vice-Chairman and B. Mukhopadhyay, Member This is an application under Article 226 of the

Constitution of India moved by one Bhagat before the Hon'ble High Court at Calcutta on 6-8-1979 and subsequent



tly, transferred to this Tribunal under the Administrative Tribunals Act, 1985. A Rule was issued in this case and there was an interim order staying further Proceedings against the applicant until further orders and ordering maintenance of status quo of the applicant as regards his 'present post' until further orders. The applicant was initially appointed as Section Officer in the Electricity Department of the Andaman & Nicobar Administration and ultimately promoted to the post of Executive Engineer in June, 1973 on an ad hoc basis. His services were placed at the disposal of the Ministry of Energy for appointment to the grade of Deputy Director/Executive Engineer under the Central Electricity Authority on deputation for a period of three years by an order dated 23-2-76. The applicant joined the post of Executive Engineer, Southern Regional Electricity Board at Bangalore under the Central Electricity Authority on or about 15th of June. After serving on several posts under the Central Electricity Authority on deputation the applicant's deputation was finally terminated on 19th July, 1979 and he reverted back to the Andaman and Nicobar Administration on 1st August, 1979. While the applicant was on deputation two charge-sheets were drawn up against him:—

(i) A minor penalty chargessheet (Annexure D) dated 30th November, 1977 under Rule 16 of the C.C.S. (C.C.A.) Rules;

(ii) A major penalty charge-sheet under Rule 14 of the C. C. S. (C.C.A.) Rules dated 19th January,

1978;

The minor penalty chargesheet was issued again on 17th April, 1979 (Annexure G).

2. After the conclusion of the enquiry into the major penalty charge-sheet mentioned above the Chief Commissioner, Andaman and Nicobar Administration issued notice asking the applicant to show cause why the proposed penalty of removal from service should not be imposed on him.

3. The applicant is aggrieved by the issue of the charge-sheet of minor penalty at Annexures D and G and by the punishment show cause notice at Annexure F and, inter alia, prays for a writ in the nature of Mandamus for quashing of the said chargesheet and the show-cause notice.

4. Before this Tribunal, Shri N. C. Chakraborty, Counsel for the applicant, has filed an amendment application in incorporating allegations against the conduct of enquiry into the major penalty proceedings Shri S. N. Banerjee, Counsel for the respondents, vehemently objects to admission of the application for amendment after a lapse of seven years on the ground that this is an attempt to introduce new points which were not taken at any time during the pendency of the writ petition before. There is considerable force in the objection of Shri Banerjee. But there is another aspect of this matter. The impugned punishment show-cause notice is an outcome of the departmental enquiry and if while challenging the punishment show-cause notice it is



alleged that there were certain infringements of the rules of the departmental enquiry which prejudiced the applicant in his defence and thereby, violated the principles of natural justice, the Tribunal cannot but look into them.

5. We shall examine the allegations of violation of the rules of departmental enquiry first :

(i) Mr. Chakraborty has argued that Rule 14 (10) of the C. C. S. (C. C. A.) Rules has been violated because the applicant was not asked by the enquiry officer to state his defence after the case of the disciplinary authority was closed.

This was, of course, a departure from the strict observance of the rules, but this was a mere peripheral infringement and did not in any way prejudice the defence of the applicant.

(ii) According to Mr. Chakraborty Rule 14 (15) was also violated because one witness whose name was not mentioned in the list of witnesses was examined.

In our opinion, Rule 14 (15) relates to production of documentary evidence. Hence the applicant had the opportunity to cross-examine the witness whose name was not mentioned in the earlier list of witnesses. There was, therefore, no offence against the principles of natural justice.

(iii) Mr. Chakraborty argues that Rule 14 (18) was also violated because the examination of the applicant by the enquiry officer was not adequate.

It is admitted that the enquiry officer did put some questions to the applicant and it is upto the enquiry officer to decide which questions he will put to get the circumstances explained. In our opinion, therefore, there is no violation of Rule 14 (18).

(iv) Mr. Chakraborty has contended there was violation of Rule 14 (19) because the applicant has to submit his written defence before he had received the written brief of the presenting officer. For this, he relies on the judgement of the Calcutta High Court in the case of Collector of Customs v. Mohd. Habibulla 1973 (1) S. L. R. 311 (Cal.) in which it is laid down that the requirements of Rule 14 (19) and the principles of natural justice demand that the delinquent officer should be served with a copy of written brief by the presenting officer before he is called upon to file his written brief.

In the instant cases the enquiry officer directed that the presenting officer was to submit his brief by 20-7-78 which a copy to the applicant who was to submit his brief by 23-7-78. The applicant however, did not wait for the brief of the presenting officer but submitted his brief on 19-7-78. He did not make any protest or pray time on the ground that he had not received the written brief of the presenting officer. Evidently, therefore, the applicant was not interested in the written brief of the presenting officer and submitted his own brief without waiting for that of the presenting



officer entirely of his own choice forgone the advantage of prior inspection of the brief of the presenting officer, he cannot take the plea later on that he was prejudiced in his defence because he had to submit his defence brief, without seeing the prosecution brief. We are therefore, of the opinion that there has been no violation of the principles of natural justice on this score.

6. Mr. Chakraborty also has pointed out that the estimate of cost of the house built by the applicant which forms part of his disproportionate assets was given to the applicant only a day before the commencement of the departmental enquiry and that the officer preparing this report was not examined as a prosecution witness depriving the applicant of the opportunity of cross-examination. Thus, according to Mr. Chakraborty, was a flagrant infraction of the principles of natural justice. Mr. Banerjee, Counsel for the respondents, has explained the circumstances in which the officer preparing the estimate of costs could not be examined as a prosecution witness. The officer concerned was away on tour and the enquiry officer who was commissioner of departmental enquiry of the Vigilance Commission and had come from Delhi was not prepared to wait. The estimate of cost was, therefore, at the last moment proved by a clerk of the concerned office. Mr. Banerjee further argues that it will be seen from the report of the enquiry officer that the delinquent officer himself admits that the value of the build-

ding constructed by him will be about Rs. 75,000/. Even if this valuation admitted by the applicant, is accepted there will be a considerable amount of assets (approximately Rs. 70,000) disproportionate to the known sources of income of the applicant. The charge, therefore, would have been substantially proved even without the document objected to by the Counsel of the applicant.

7. A point has also been taken by Mr. Chakraborty that the Chief Commissioner of Andaman & Nicobar Administration had reasons to bear a grudge against the applicant. We need not go into this point because the charge of possession of disproportionate assets was proved by evidence that had nothing to do with the personal feelings of the Chief Commissioner Departmental enquiry, as we have noted above, was conducted by an officer of the Central Vigilance Commission. Moreover, Shri Krishnatry who was the Chief Commissioner at the time of the chargesheet has since been transferred.

8. Before we proceed further we may note on the basis of what we have discussed above that we are of the opinion that there was no irregularity in the conduct of the departmental proceedings that was prejudicial to the defence of the applicant and vitiated the proceedings.

9. Mr. Chakraborty has assailed the punishment show-cause notice at Annexure-F on the ground that the



**Asha Mukul Pal****Member****Central Admn. Tribuna**

Chief Commissioner, Andaman & Nicobar Administration was not competent authority to issue such a notice because the applicant was at the relevant time on deputation to a Group A service under the Government of India and accordingly, the President of India was his appointing authority. In this connection, Mr. Chakraborty draws our attention to Rule 14 (21) the C.C.S. (C.C.A.) Rules. According to Mr. Chakraborty the Chief Commissioner was not competent to impose the penalty of removal from service and should, therefore, have forwarded the records of the departmental enquiry to the President of India for necessary action.

10. Mr. Banerjee, Counsel for the respondents, has argued in reply that the Chief Commissioner could have forwarded the records to the President only after he had formed an opinion that the penalty of removal of service would be imposed. According to Mr. Banerjee, in the second show-cause notice the Chief Commissioner had only mentioned his provisional conclusion regarding the punishment and not his final opinion; he would have formed his final opinion only on receipt of the reply of the applicant. We do not think that the contention of Mr. Banerjee is valid. There is no doubt that while the applicant was on deputation, his appointing authority was the President of India under Rule 2 of the C.C.S. (C.C.A.) Rules and it was only the President who was, therefore, competent to impose penalties, mentioned in Rule 11 (v) to 11 (ix). The imposition of penalties under,

these rules are dealt with the Rule 15 (4) of the C.C.S. (C.C.A.) Rules. The rule contained a provision for a second show-cause notices prior to the amendment dated 2-9-78. The issue of the second show-cause notice, therefore, is clearly in the domain of the punishing authority and a disciplinary authority who cannot impose a major penalty is not competent to issue the second show-cause notice. In this case, according to the amended provisions of Rule 15 (4), the issue of the impugned notice was not necessary, but since it was issued it should have been issued by the proper authority. We, therefore, agree with Mr. Chakraborty that the Chief Commissioner was not competent to issue the impugned punishment show-cause notice at Annexure-F. This notice is, therefore, liable to be set aside.

11. Mr. Chakraborty has assailed the minor penalty charge sheet at Annexure D & G on the ground that the charge is vague and not maintainable. The chargesheets at Annexure D & G are identical. The chargesheet at Annexure D was issued before the issue of the major penalty chargesheet, but, it has been explained by Mr. Banerjee, because the applicant was away on deputation the chargesheet got mislaid in transit and could not be served on him. The same chargesheet was, therefore, issued again later which is annexed as Annexure G. The applicant in this case has been charged of conduct unbecoming of a Government servant because of giving appointment to one Jagjivan Lal in the post of Senior Draftsman Grade-I, who did not



have the requisite qualifications. The charge itself and the circumstances mentioned in the imputation do not specify any misconduct and, therefore, general charge of conduct unbecoming of a Government servant is not maintainable in view of the judgement of the Supreme Court in *A. L. Kalra v. The Project & Equipment Corporation of India Ltd.* We therefore, hold that the chargesheet of the minor penalty case at Annexure D & G is not maintainable and liable to be set aside.

12. In the light of what we have discussed above we make the following order :—

- (i) The minor penalty chargesheet at Annexure-D & G be set

aside;

- (ii) The punishment showcause notice at Annexure-F be set aside;

- (iii) The departmental enquiry for major penalty under Rule 14 of the C.C.S. (C.C.A.) Rules in connection with which the impugned notice at Annexure-F was issued be remanded to the Chief Commissioner, Andaman & Nicobar Administration with the liberty to proceed with the departmental enquiry as Per extant rules from the stage immediately before the issue of the impugned show-cause notice.

13. This disposes of the application without any order for costs.



### OBSERVATION

**Departmental Inquiry after acquittal in criminal proceedings - Disciplinary authority has power to proceed, but should consider whether it is worth while to do so—In departmental inquiry same facts, documents and same witnesses cited who had appeared in criminal case resulting in acquittal—Departmental Inquiry is futile.**

### OBSERVED BY

Mr. C. Venkataraman and Mr. G. Sreedharan Nair  
 Hon'ble Members, Central Administrative Tribunal

### IN

T. A. No. 214 of 1985, decided on 27-3-1986.

### IMPORTANT POINT

*Whereas departmental authority has a right to continue a domestic inquiry even in case, where the employee has been acquitted by Criminal Court, as before doing so, it must consider whether it is worth while.*

### TEXT

C. Venkataraman, Member.—This Writ Petition No. 3988 of 1982 transferred to the Central Administrative Tribunal by the High Court of Judicature at Madras.

2. The applicant herein was working as a technician in the Telephone Exchange at Srirangam. According to him, on certain allegations he was charged for offence under section 420 of the IPC before the Chief Judicial Magistrate, Tiruchirapalli, who, in his judgement dated 27-3-81, acquitted him honourably, giving a finding that the prosecution had failed to prove the offence. The department had not filed any appeal against the judgement. The grievance of the applicant is that after the acquittal in the criminal prosecution on 27-3-1981 when he was discharging his duties to the satisfac-

tion of his superiors was served a memo of charges on 28-4-1982 and that an inquiry under Rule 14 of the CCS (CCA) Rules had been ordered. He has averred in his affidavit that the charge in the said memo of 28-4-1982 relates to the matter which already been the subject of a decision in the criminal court.

3. The applicant's contention in the affidavit is that as the present charge in the contemplated departmental proceedings relates to the matter which has already been decided in the court of the Chief Judicial Magistrate, Tiruchirapalli, the matter should be treated as concluded once for all, especially since the acquittal by the criminal court was an honorable one and that it would preclude further departmental enquiry



in respect of the same subject matter. He has, accordingly, prayed for a direction to call for the records in the charge memo dated 28-4-1982 and quash the same.

4. In the counter affidavit it has been stated that the applicant was proceeded against in a criminal case and the same ended in an acquittal which was not, however, an honourable one. That was the reason why departmental proceedings were initiated against him as per the rules. According to the counter affidavit, the case got decided in the court in the negative because one of the key witnesses turned hostile during examination/cross-examination in the court. But, now, the disciplinary authority was well convinced about the availability of good and sufficient evidences to prove the charges against the official in quasi judicial departmental inquiry instituted against the applicant. It has further been contended that acquittal in a criminal prosecution is not a bar for departmental proceedings on the same facts.

5. The learned counsel for applicant argued before us on 12-3-1986 that if there is an acquittal on the merits at the trial in the court of the Chief Judicial Magistrate, Tiruchirapalli it would not be proper for the departmental authority to arrive at some other finding inconsistent with the acquittal. He cited *Krishnamurthy v. Chief Engineer, Southern Railway*. 1956 (1) M.L.J. 306. He contended that the departmental authorities would have no jurisdiction to sit as an appellate authority over the

decisions of law courts, as brought out in *Hari Narayan Dubey v. State of Madhya Pradesh*. 1976 SLJ 149. He pointed out that it has also been decided in *George Varghese v. Food Corporation of India*, 1983 T.L.N.J. 57 that it will not be open to a department to resurrect the same old charges on which the petitioner faced a criminal trial and was acquitted, to proceed departmentally. He brought out that in this case the charge in the criminal case before the Chief Judicial Magistrate was that the applicant who was not authorised to collect any money on behalf of the Telephones Department, had received Rs. 800 from one Mr. V. Krishnamurthy on 19-9-1975 sent through one Mr. Nallendran for being deposited to the Telephones Department for getting a telephone connection in the name of Mrs. Krishnamurthy and subsequently when she had given up the idea of getting the telephone, the amount having not been deposited with the Telephones Department, was not fully returned to Mr. Krishnamurthy and thus he had played deception on him by inducing him to part with Rs. 800. The charge framed against the applicant in the departmental proceedings contemplated under the memo dated 28-4-1982 is to the applicant had falsely represented to Mr. Krishnamurthy that Rs. 800 had to be deposited to the telephones for Department getting telephone connection and that on 19-9-1975 he had accepted to Rs. 800 sent by Mr. Krishnamurthy through Mr. Nallendran when he knew that there was no Demand Note from the Telephones Department



directing such remittance and ultimately he failed to remit the same, thereby contravening Rule 3 (1) (i) of the CCS Conduct Rules, 1964. The charges were based on the same allegations and were also same in content. The Chief Judicial Magistrate, Tiruchirapalli, had held—

“In cross examination he (PW6-Shri Krishnamurthy) has stated that the accused did not tell him that he would make arrangements for getting telephone connection and that the accused did not ask him to give Rs. 800 on believing any representations made by the accused. Thus there is clear and categorical evidence made in unambiguous terms by PW 6 that the accused did not make any representations to him and that he did not ask him to give Rs. 800 and that he did not part with any money believing any word of the accused. Thus on the evidence of PW 6, the entire prosecution case falls to the ground.

14. The learned counsel for the complainant contended that there are circumstances show that the accused has committed this offence direct and primary evidence in this regard is only that of PW 6. When his evidence is totally against the prosecution case, any amount of circumstantial evidence cannot be of any avail against the accused. Further more, I would like to point out there is neither any circumstantial evidence to come to the conclusion that the accused has

committed the offence with which he is charged;”

“18. The learned counsel for the accused contended that the accused had received the sum of Rs. 800 only as friend just to PW 6 by help by deposit of account as and when required by the department in as much as he was working in the same department and not that he received that amount as a departmental man or as a man who can receive it on behalf of the department. This argument of the learned counsel for the accused has got basis as seen from the pieces of evidence which I have already referred to. There is also evidence to show that an application was sent to Rajamani Ammal in the prescribed form and the same was returned by the department as evidence by Ex. D. 1. So it is clearly established that an application form was submitted to the department for telephone connection at that time and since later Krishnamurthy himself did not require any telephone connection, the amount given to the accused for the purpose of depositing in the Department has been returned.

19. In view of the above evidence I did not feel it necessary to refer to the other Exhibits which are not germane to the case.

20. In view of my discussion above, it is not clear that the prosecution has failed to prove the offence against the accused. In



answer the point in the negative.

21. In the result the accused is not found guilty of the offence under section 420 I.P.C., and hence he is acquitted under section 248 (1) Cr P.C”.

6. In view of the honourable acquittal and in the light of the decisions cited above, the learned counsel for the applicant prayed that the prayer in the application may be allowed.

7. The counsel for the respondent argued that the law on this matter is now settled and invited reference to *Corporation of Nagpur v. Ramachandra G Madak* A.I.R. 1984 S.C. 626 where it has been held that merely because the accused is acquitted. The power of the authority concerned to continue the departmental enquiry is not taken away nor its discretion in any way fetters. In this case, the departmental authority had chosen to exercise his power to proceed against the applicant by instituting the departmental enquiry.

8. In view of the Supreme Court in AIR 1984 referred to above, we are not discussing the other references cited by the learned counsel for applicant. 1984 AIR 626 : *Corporation of Nagpur v. Ramachandra Modak*, referred to above the Supreme Court held—

“In other question that remains is if the respondents are acquitted in the criminal case whether or not the departmental inquiry pending against the respondents would have to continue. This is a matter which is to be decided by

the department after considering the nature of the findings given by the criminal court. Normally where the accused is acquitted honourably and completely exonerated of the charges it would not be expedient to continue a departmental inquiry on the very same charge or grounds or evidence, but the fact remains, however, that merely because the accused is acquitted, the power of the outgoing concerned to continue the departmental inquiry is not taken away nor is its discretion (discretion) in any way fettered. However, as quite some time has elapsed since the departmental inquiry had started the authority concerned will take into consideration this factor in coming to the conclusion if it is really worthwhile to continue the departmental inquiry in the event of the acquittal of the respondents. If, however, the authority feels that there is sufficient evidence and good grounds to proceed with the inquiry, it can certainly do so”.

9. Though the decision referred to above talks of a pending departmental inquiry, it follows that the principle enunciated will be applicable to the institution of a fresh departmental inquiry also after the acquittal of an accused in a criminal court. The decision starts saying that it would not be expedient to continue departmental inquiry on the very same charges or grounds or evidence. Nevertheless, the departmental authority is vested with the power to continue the inquiry at



its discretion. However, before taking any decision in exercise of the power vested in the departmental authority it would be necessary to consider whether it is really worthwhile to continue with the departmental inquiry and whether there is sufficient evidence and good ground for that. This would seem to imply that there has to be a careful application of the mind by the departmental authority concerned to the judicial pronouncement in the criminal case and there must be good and sufficient reasons to initiate a departmental inquiry notwithstanding the acquittal by the criminal court if the charge is similar based on the same facts.

10 In this case, admittedly, the facts are identical. Apart from the same witnesses and the same documents as in the criminal case before the Chief Judicial Magistrate, Tiruchirapalli Government Examiner of questioned documents and

Shri Kumaraswami, son of Krishnamoorthy who was the principal witness in the Chief Judicial Magistrate's Court are sought to be relied upon by the departmental inquiry. In the nature of the case, these two witnesses are not material so as to affect the result of the proceedings. There has been a thorough examination of the witnesses and documents in the Chief Judicial Magistrate's Court and such examination led to a clear conclusion that the prosecution had failed to prove the case charged against the accused.

11. In the light of the overwhelming evidence in favour of the applicant in the Magistrate's Court, it would be futile to go through the departmental inquiry.

In these circumstances, the application is allowed.

Petition allowed



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## OBSERVATION

(i) **Confirmation**—Petitioner considered for by the D.P.C but not found him suitable—Whether Tribunal can interfere with the decision of D. P. C. as such—(No).

(ii) **Gradation list**—Placing of some persons confirmed later than petitioner above the petitioner—Validity—Prima facie it unjust and improper—Competent authority direct to rearrange gradation list and refix the seniority of the petitioner vis a vis the incumbents according to rules.

## OBSERVED BY

Mr. B. R. Patel and

K. P. Acharya

Hon'ble Members, Central Administrative Tribunal (Cuttack Bench)

## IN

T. A. No. 68 of 1986 (O. J. C. No. 1435 of 1979) decided on 7th October, 1986.

## IMPORTANT POINT

*Administrative Tribunal can not interfere with the decision of D. H. C. with regard to confirmation finding the petitioner as unsuitable.*

## TEXT

K. P. Acharya, Judicial Member  
The petitioner is a Junior Engineer in the Telecommunication Department and the initial appointment of the petitioner was in the cadre of Engineering Supervisor (Telegraphs) and this has been redesignated as Junior Engineer. The petitioner was recruited as such in the year 1984 and he was sent for training to Calcutta and in the year 1966 he was put on probation and had been confirmed as a Junior Engineer with effect from 1st January, 1971, though according to the petitioner, he should have been confirmed with effect from 1st March,

1970 as on such date there were fifteen vacancies for confirmation for which the petitioner has a right to be confirmed with effect from 1st March, 1970 in the reserve quota for the scheduled caste as the petitioner is a member of scheduled caste. Further allegation of the petitioner is that his case not at all considered though the case of his juniors was considered and they were confirmed but very unfortunately the petitioner having been confirmed with effect from 1-1-1971, an illegality has been committed thereby jeopardising the interest of the petitioner for his promotional prospects.



Further allegation of the petitioner is that, though he has been confirmed with effect from 1-1-1971 yet some of his colleagues having been confirmed much latter, have been placed in the gradation list higher than the petitioner which is another illegality committed by the respondents-Opp. Parties. Being aggrieved by the aforesaid action of the Departmental Authorities, the petitioner invoked the extra-ordinary jurisdiction of the Hon'ble High Court of Orissa by filing an application under Article 226 of the Constitution praying therein to set aside the above mentioned illegal actions of the respondents - Opposite Parties. This case has been transferred under section 29 of the Administrative Tribunals Act, 1985 for disposal according to law.

2. The case of the respondents is that the petitioner was duly considered for confirmation but the authorities considering his case found him to be unsuitable and therefore the petitioner was not confirmed with effect from 1-3-1970. The Departmental Promotion Committee later, though found the petitioner to be suitable, yet a departmental proceeding having remained pending against him, the matter was deferred and after the petitioner being exonerated from the charges in disciplinary proceeding was confirmed with effect from 1-1-1971. As far as the placement of the petitioner below the persons confirmed later is concerned, no illegality has been committed because they were brought from the different circles and according to rules though

they have been confirmed later but they have been placed higher than the petitioner because of the peculiar circumstances contemplated under the rules.

3. With these averments of both parties, it was strenuously urged by Mr. Rath, learned counsel appearing for the petitioner that gross illegality has been committed by the respondents—Opposite Parties for not having considered the cause of petitioner for confirmation with effect from 1-3-1970. Reliance was placed by the learned counsel for the petitioner on the rules enacted by the Central Government of reservation quotas for the scheduled caste and also the rules relating to the quota if any filled up in a particular to be carried over to next year and therefore, according to the learned counsel there being enough vacancies, the petitioner could have been confirmed if his case would have been considered especially in view of the fact there has no blemish in the service career of petitioner. On the other hand it was contended by the learned counsel for the Central Government that the case of the petitioner was duly considered and the petitioner was duly considered and the D.P.C., having found him to be unsuitable, petitioner was not confirmed with effect from 1-3-1970. In order to correctly appreciate and adjudicate his main controversial issue, we had called for the minutes of the D.P.C., held for three years including the D. P.D., held on 19-10-1971, 3-4-1972 and 1-8-1973. The contention of the petitioner that his case was not conside-



red in the year 1971 is absolutely wrong. We have perused the minutes of the D.P.C., held on 19-10-1971 and it is found therefrom that the cases of sixty incumbents were considered out of whom the present petitioner Rabindra Chandra Sethi was one of them and appears against serial No. 47. The minutes of the D.P.C., runs as follows :—

“D.P.C., considered the following officials for confirmation from Sl. Nos. 1 to 16 excepting Sl. Nos. 19, 40, 47 and 52. The recommendations of the D. P. C., in respect of Sarbashri G. B. Sarangi and Binod Chandra are kept in sealed covers.

The D. P. C., did not consider the following officials for their confirmation now :

- (i) Nisakar Das.
- (ii) R. C. Sethi”.

From the above, it is crystal clear that the case of the present petitioner was considered and he was found to be unsuitable. The case of the petitioner was also considered by a D.P.C., held on 3-4-1972 and also by the D. P. C., held on 1-8-1973. On both dates the case of the present petitioner (named against Sl. 4 in each list) was considered and against Sl. 4 in the minutes of both the D.P.C., it has been/mentioned “post may be kept reserved”. This eventually means, that the petitioner though found suitable for

confirmation by the C.P.C., held on both the dates mentioned above, yet he could not be any way fettered—— Thus the legal position that emerges is that the acquittal by a criminal court is not a bar for a disciplinary proceeding even on the same charge or same facts. However, as quite some time has elapsed since the departmental enquiry had started, the disciplinary authority concerned will take into consideration this factor in coming to the conclusion if it is really worthwhile to continue the departmental enquiry in the event of the acquittal of the respondents”.

7. It is clear that the enquiry proceedings against the applicant stands vitiated at the stage when the authority issued a show cause notice proposing penalty without furnishing a copy of the enquiry officer's report. The order of the disciplinary authority dated 13-5-1981 removing the applicant from service is therefore quashed. The respondents are at liberty to continue the enquiry from the stage of issue of show cause notice if they so choose. The applicant is also at liberty to plead at the enquiry, if continued, that he has been acquitted in a Court of Law on the same charge and that will be taken into consideration by the Disciplinary Authority before arriving at the conclusion.

8. The application is allowed.

Petition allowed



Redort No. 161, p .04

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### OBSERVATION

(i) **Voluntary Retirement—Notice given and accepted—Later applicant withdrew notice alleging that he had tendered notice owing to a misunderstanding with his boss—Appointing authority did not agree to withdrawal of notice—Can force withdrawal—(No).**

(ii) **Rule 48A Pension Rules—Voluntary retirement—Notice given for accepted by appointing authority, withdrawal request not allowed by him—Can appointing authority be compelled to accept withdrawal No.**

(iii) **Discrimination in Voluntary retirement Applicant gave notice for Voluntary retirement which was not allowed to be withdrawn; alleged that one other person was allowed to withdraw hence discrimination was caused—Held no discrimination Each case to be dealt on its own merits.**

### OBSERVED BY

Mr. G. Ramanujam

Mr. C. Venkataraman

Hon'ble Members, Central Administrative Tribunal (Madras Bench)

### IN

TA 105/1985 (WP 11453/1981), decided on 1st February, 1986.

### IMPORTANT POINT

*Notice of Voluntary retirement once given and accepted, it can not be withdrawn without specific approval of the appointing authority.*

### TEXT

G. Ramanujam, Vice-Chairman :—  
This matter was originally filed before the High Court as Writ Petition No. 11453 of 1981 and later transferred to this Tribunal and re-numbered as TA 105/85.

2. In the Writ Petition has prayed for the issue of Writ of Certiorari to quash on Order dated 9-9-81 accepting the Notice dated 20-6-1981 given by the Applicant of voluntary retirement. The circumstances under which the Petitioner came before the Court may be shortly stated. The Applicant was working as Technical Supervisor in the Telephones Department at Tiruvarur at

Thanjavur Division. It appears that there was some misunderstanding between the Applicant and his superiors which has arisen out of an Order transferring him from Triuvapur to Ayyampet on 28-7-80. The Applicant sent a letter dated 20-6-81 seeking voluntary retirement with immediate effect and stating that if three months notice is insisted the letter may be treated as notice of Voluntary Retirement and he should be permitted to go on leave till the three months period is over. Subsequently he sent in a letter dated 15-9-81 withdrawing the offer of voluntary retirement sent earlier on 20-6-81. Even



before the said withdrawal of his offer to voluntarily retirement the Appointing Authority has accepted his offer of voluntary retirement. It is against the said acceptance of the offer of voluntary retirement by the authorities concerned the Applicant came before the Court to quash the same.

3. The question is whether on the peculiar facts of this case the Applicant could be granted any relief. The Applicant's learned Counsel contends that there were specific reasons for the Applicant to give the letter dated 20-6-81 offering to voluntarily retire with immediate effect and that letter he had withdrawn before the same was accepted by the authorities. According to the learned Counsel for the Applicant, the acceptance was intimated to him only on 15-10-81, and as per the rules he has got three months time before which he can withdraw the offer. In this case the offer made by the Applicant for voluntary retirement has been accepted by the Appointing Authority even on 1-9-81 as seen from the files produced by the learned Counsel for the Respondents. After the Appointing Authority has accepted his offer of voluntary retirement the Divisional Engineer, concerned was asked to communicate the acceptance to the Applicant and this was done on 9-9-81. The information that the appointing Authority has accepted his offer of voluntary retirement was communicated by the Divisional Engineer, Thanjavur in the communication dated 9th September, 1981 by Registered Post originally on the 11th September, 81 was actually

received by the Applicant only on 15-10-81. Thereafter when the Applicant withdrew the offer, the Department did not permit him to do so.

4. Though the learned Counsel for the Applicant referred to various circumstances which led to his sending the letter dated 20-6-81 offering to voluntarily retire forthwith it is not for us to go into the reasons for sending that letter. Once a letter is sent by the Applicant offering to retire voluntarily, whatever be the reasons for doing so, and that letter is accepted by the Appointing Authority as early as 1-9-81, the Applicant cannot withdraw his earlier offer which has been duly accepted. It is true the Applicant has got three months time to change the mind and withdraw his original offer, but that right is subject to Rules 48A of Pension Rules. As per the Rule 48A (4) "A Government servant, who has elected to retire under this rule and has given the necessary notice to that effect to the Appointing Authority, shall be precluded from withdrawing his notice except with the specific approval of such authority." In this case though the Applicant wanted to resile from the original notice, the Appointing Authority did not permit him on the ground that he has already accepted the election made by the applicant to retire from service.

5. The Learned Counsel for the Applicant than states that in the case of one Mr. Dhakshanamoorthi he was permitted to withdraw his offer of resignation but in the Applicant's case alone the Appointing Authority did not permit him withdraw his earlier



**G. Ramanujam**  
**Member**  
**Central Admn. Tribunal**

notice. We are not in a position to say that any discrimination has taken place in this case. The case of Mr. Dhakshinamoorthy might have been considered by the Appointing Authority as a fit case for allowing him to withdraw the earlier notice. All offers of voluntary retirement cannot be treated alike. Each case will have to be considered on its own merits. Sub rule 4 of Rule 48A referred to above, gives discretion to the Appointing Authority and it stipulates for specific approval of the Appointing Authority for the withdrawal of the notice of voluntary retirement. The fact that the Appointing Authority has permitted Mr. Dhakshinamoorthy to withdraw his notice of voluntary retirement even if true, does not mean that the Appointing Authority has to automatically accept the Applicant's withdrawal of the notice of voluntary retirement. We do not know under what circumstances the Appointing Authority permitted Mr. Dhakshinamoorthy to withdraw the notice voluntary retire-

ment. We do not, therefore, see that there has been any discrimination in the matter of not specifically permitting the Applicant to withdraw the notice of retirement as the rules give him a discretion either permit, withdrawal or not. Further, in this case we do not see how the petitioner can withdraw the notice of voluntary retirement after the notice has been accepted without the approval of the Appointing Authority. It may be that Appointing Authority before acceptance has to automatically act on the withdrawal and not specific approval is necessary as contemplated by Rule 48A (4). In this case, the Appointing Authority has chosen to accept the offer of voluntary retirement on 1-9-81 and later he has not chosen to exercise his discretion in favour of the Applicant when he attempted to withdraw his earlier offer of voluntary retirement.

In this view, the Application fails and is dismissed.

Application dismissed.



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### OBSERVATION

**F. R. 22C.—Fixation of pay—Applicant while working in one deptt. applied through proper channel and selected in another—Submitted technical resignation—Past service counted for pension and leave but not for fixation of Pay—Held President's decision of 17-6-65 must be followed in letter and spirit and to be reflexed.**

### OBSERVED BY

**Mr. Amarjeet Chaudhary,**

**Mr. Birbal Nath**

**Hon'ble Members, Central Administrative Tribunal (Chandigarh Bench)**

### IN

**T. A. 500 of 1986 decided on 18-9-1986**

### IMPORTANT POINT

*In case of a technical resignation the past service should be taken into account for pay fixation.*

### TEXT

Amerjeet Chaudhary, J. M. and Birbal Nath, Admn. Member : — This is Civil writ petition filed in the High Court of Himachal Pradesh, Shimla in May, 1975 and now transferred to be Administrative Tribunal under section 29 (2) of the Central Administrative Tribunals Act, 1985. In this writ petition, the petitioner had prayed for issuing directions to the respondents to fix the salary of the petitioner as Auditor in the Office of A. G. Haryana and later in the office of A. G. Himachal Pradesh giving him the benefit of his past service rendered in the Office of Director, Labour Bureau, Shimla and for quashing Annexures P-K and P-L.

2. As per petition, the petitioner was employed as a Computer w.e.f. 16th March 1968 in the Office of the Directorate of Labour Bureau Shimla. When

the posts of Upper Division Clerks in the then Office of the Accountant General, Punjab, Haryana and Himachal Pradesh in Chandigarh were advertised to be filled, he accordingly applied for the same through his Employer for being considered to one of the posts of Upper Division Clerks, which were later redesignated as Auditors in the aforesaid office. He selected to the said post. To take up the new appointment, he was asked to resign from the post held by him. Accordingly he had to submit his resignation on technical grounds, which was duly accepted. As in the mean time, the Offices of the A. G. Punjab, Haryana and Himachal Pradesh were bifurcated, the petitioner was asked to join A.G. Haryana, which he accordingly joined on 1st April, 1971 after having been relieved of his previ-



ous post held by him in the Labour Bureau, Shimla. Subsequently, he was adjusted against one of the posts of Auditors by way of mutual arrangements and adjustment made between the three offices, viz. A. G. Punjab, A. G. Haryana and A.G. Himachal Pradesh. Vide Annexure P-A, the Petitioner was informed that the past service rendered by him in the office of Director, Labour Bureau, Shimla, i.e. from 16-3-1968 to 31-3-1971 as Computer was allowed to be counted for the purposes of pension/leave in terms of Comptroller and Auditor General's letter No. 2119-NGE. -1/3 67-IV dated 27-9-1967, which clearly indicates that he was given partial benefit of his past service in his new appointment in the office of A.G. Haryana. He was deprived of his previous service for the purpose of fixation of pay on his being appointed in the said office of A. G. Haryana. The petitioner had been filing representations from time to time and sending reminders in pursuance thereto. From the perusal of the case file it appears that no action was taken on these representations. The petitioner was informed vide letter dated 5-5-1975 (Annexure P-K) that there was no case for approaching the Govt. of India in the matter. Vide subsequent communication dated 19th May, 1975 (Annexure P-L) he was informed that the position about his case had already been intimated in the earlier communication dated 5-5-1975. As there was no ambiguity in the case, the same stood closed.

3. The petitioner had challenged his non-fixation of pay in terms of the

letter of the President of India as contained in Memorandum No. 3379 E. III (C)/65 dated 17th June, 1965, on the ground of equity and equality before law and the same is discriminatory.

4. We have heard the arguments advanced at the Bar and given thoughtful consideration to the matter. The learned Counsel for the Petitioner has relied upon the letter of President of India contained in Memorandum dated 17th June, 1965 and Fundamental Rule 22-C, whereas the learned Counsel for the respondents has mainly relied upon Fundamental Rule 27 and contended that the petitioner cannot be given the benefit of Pre-mature increment on the ground that the post of U. D. C. is of higher responsibility. The post, which the petitioner was holding previously was different and carried on responsibility and was not of much importance. Rather, it was different in nature being technical post.

5. In order to appreciate the arguments of the learned Counsel for the petitioner, the decision of the President of India as contained in Memorandum dated 17th June, 1965 is required to be read :

Memorandum dt. 17-6-1965. "The question whether the benefit of past service for purposes of fixation of pay can be given to Government servant who resigns his post before taking up appointment in the new post in the same or another Department has been under the consideration of the Government of India. Normally the benefit of past service is given



only in those cases where such service has not terminated by resignation/removal/dismissal. The President is, however, pleased to decide that in cases where Government servants apply for posts in the same/other department through proper channel and on selection, they are asked to resign the previous posts for administrative reasons, the benefit of past service may, if otherwise, admissible under rules, be given for purposes of fixation of pay in the new post treating the registration as a technical formality. The pay in such cases may be fixed under F. R. 27".

6. In order to arrive at a safe conclusion, F. R. 22-C on which the Counsel for the applicant has relied upon and F. R. 27 which the Counsel for the Respondents has relied upon, are also reproduced : —

**F. R. 22-C**

"Notwithstanding anything contained in these rules, where a Government servant holding a post in a substantive, temporary or officiating capacity is promoted or appointed in a substantive, temporary or officiating capacity to another post carrying duties and responsibilities of greater importance than those attaching to the post held by him, his initial pay in the time scale of the higher post shall be fixed at the stage next above the pay nationally arrived at by increasing his pay in respect of the lower post by one

increment at the stage at which such pay has accrued."

**F. R. 27**

"Subject to any general or special orders that may be made by the President in this behalf, authority may grant a premature increment to a Government servant on a timescale of it has power to create a post in the same cadre on the same scale of pay."

7. From the above interpretation, a safe conclusion can be arrived that there is a clear provision for fixation of pay under F. R. 22-C in the case where a Government servant is appointed in a substantive, temporary or officiating capacity to another post carrying the duties and responsibilities of greater importance than the post earlier held by him and his claim for re-fixation of pay is tenable by law. The applicant's application for the post of Upper Division Clerk in the office of Accountant General was duly forwarded and recommended by the Director, Labour Bureau, Shimla where the applicant was employed as a Computer. On his selection as U. D. C. in the office of Accountant General, the applicant had to resign from the post of Computer in the office of Labour Bureau, Shimla on technical grounds and the service rendered by the applicant from 16-3-68 to 31-3-71 in the office of Labour Bureau Shimla as a Computer was allowed to be counted for the purposes of pension/leave by the Comptroller and Auditor General. The decision of President of India as



contained in Memorandum dated 17th June, 1955 is required to be followed in letter and spirit.

In view of discussion, we find merit in the application. The Respondent are directed to refix the pay of the applicant

giving him the benefit of his part service rendered in the office of Director, Labour Bureau Shimla.

The application of the applicant is admitted with no order as to costs.

Application allowed



## OBSERVATION

**Constitution of India – Article 20 (2) – Termination of service on misconduct—Employee tendered apology—After considering the apology he was reinstated—Whether after reinstatement an enquiry can be conducted against him – (No).**

## OBSERVED BY

V. P. Salve  
Hon'ble Judge Bombay High Court (Aurangabad Bench)

## IN

Second Appeal No. 593 of 1979 decided on 7th November, 1985, in the case of Shiv Singh Appellant v. Marathwada University, Aurangabad Respondent.

## IMPORTANT POINT

*On reinstatement of an employee, terminated due to the misconduct after tendering of an apology, no enquiry can be conducted against him.*

## TEXT

Salve, J. : —The second appeal raises a substantial question of law inasmuch as the appellant having been reinstated on 25th February, 1972, could an enquiry be instituted, continued and decided against him terminating his services? The question raised is based on the appellant being faced in double jeopardy which is prohibited in law.

2. The facts of the case are that on 20th April 1964 the plaintiff was appointed as Clerk-cum typist to work in the General Branch of Marathwada University, Aurangabad. On 22nd February 1965 he was confirmed in that post. On 30th October 1969 he was promoted as Senior Assistant on probation for two years, and posted to work in the

Department of Zoology. Before he completed the period of probation, he chose to officiate as the President of the Marathwada University Non-teaching Employees Union. It was a body which was neither registered either under the Bombay Public Trusts Act or Societies Registration Act, nor was recognised by the defendant-respondent. On 20th September, 1971 the appellant under his own signature, acting as the President of such Union, published the 28 page representation containing about 71 items. This representation is essentially against the then Registrar Shri Dhaman- kar, and also against some of the officers of the respondent. It contained matter casting aspersion on the in-



tegrity, efficiency and utility of the administration of the respondent from top to bottom. The respondent was offended by the representation and was of the view that the act of the appellant in publishing such representation amounted to gross indiscipline and misconduct on the part of the appellant polluting the atmosphere. Owing to that the appellant on 22nd September, 1971 was placed under suspension. On that day he was working as a Senior Assistant in the Welfare Activities Section of the respondent. On 17th February 1972 the F. & E.A.C. recommended the Executive Council of the respondent to appoint a Committee to report on the acts of the appellants envisaging gross indiscipline and misconduct on his part. Accordingly a threemen Committee was appointed to enquire into the matter. Sarvashri K.V. Gadia, Ramarao Janib and Randive were the members of the Enquiry Committee, which was appointed on 22nd February 1972. It was the specific case of the plaintiff appellant that after he was placed under suspension on 22nd September 1971, he made representations to the authorities to reconsider the decision of suspension and to reinstate him, which was not done. He, therefore, went on fast on 22nd February 1972. During his fast the then Vice Chacellor assured him that if he tendered an apology, he would be reinstated. He therefore, submitted a written apology on 25th February, 1972 and he was allowed to join his duties the very same day in the same post. He was transferred

on 22nd March 1972 to the Board and Sports Section headed by the Diretor of Physical Education and was re-transferred to the same post in April 1973.

3. In the meanwhile on 17th February 1972, a resolution was passed by the Executive Council to appoint a committee to report on the case of misconduct committed by the appellant, the allegation being that he had submitted a cyclostyled representation to the Vice-Chancellor of the University demanding the removal of the then Registrar Shri V.K. Dhamankar. The representation was signed by him as President of the Union. The representation was dated 20th September 1971. It was the case of the appellant that the representation was made in accordance with the decision of the Union of the Non-teaching Employees of the University, which Union is admittedly neither a registered union nor recognised by the University.

4. The three-man committee continued its enquiry and on 20th April 1972 the appellant filed his written statement admitting that he had forwarded such a representation, but he same was done in the capecity as the President of the Union and not in his official capacity as the employees of the University. The Committee proceeded with the enquiry and ultimately held that the representation to the Vice-chancellor amounted to a serious misconduct on the part of the appellant and submitted a report accordingly to the University, who terminated the servicer of the



plaintiff-appellant. The appellant filed the suit for a declaration that the order of termination dated 2nd/3rd May 1973 is null and void and that the appellant still continues to be in service of the defendant. By a judgement dated 31st December 1976 the Second Joint Civil Judge, (Junior Division), Aurangabad decreed the suit and declared that the order of termination of the appellant was null and void and that he continued to be in service of the defendant-University.

5. On appeal the Extra Assistant Judge, Aurangabad reversed the finding and judgement of the lower Court, allowed appeal and hence the plaintiff filed the present second appeal.

6. Mr. Bora argued the appeal on behalf of the appellant mainly contending that the plaintiff appellant was ordered to be reinstated which fact is admitted in the written statement by the University, on the appellant tendering his written apology. Once he is reinstated, the matter should be treated as closed and could not have been reopened by the Committee. He relied on a decision of the Supreme Court reported in *The State of Assam v. J. N. Ray Biswas*, A.I.R. 1975 S.C. 2277 especially para 4 which reads as under :

“we may however make it clear that no Government servant can urge that if for some technical or other, good ground, procedural or other, the first enquiry or punishment or

exoneration is found bad in law that a second enquiry cannot be launched. It can be but once a disciplinary case has closed and the official reinstated presumably on full exoneration, a chagrined Government cannot re-start the exercise in the absence of specific power to review or revive, vested by the rules in some authority. The basis of the rule of law cannot be breached without legal provision or other vitiating factor invalidating the earlier enquiry. For the present this is theoretical because no such deadly defect is apparent on the record.”

7. It is clear that once a matter has been decided by the highest authority viz. the Vice-Chancellor that the appellant be reinstated on tendering an apology of which there is no dispute, then it is difficult to hold that the enquiry conducted against the appellant after his reinstatement would be a legal action. On this ground alone the appellant is entitled to succeed and the appeal will have to be allowed. It is not necessary to traverse the other grounds which were argued before me about granting a fair opportunity to the appellant during the enquiry since according to the appellant the enquiry itself is vitiated as it violates the bar of double jeopardy granted to every citizen of India by virtue of Article 20 (2) of the Constitution.

8. In the result, the appeal is allowed. The order of the 2nd Joint Civil Judge (Junior Division), Aurangabad is revived and the order



of the lower Appellate Court is set aside. The plaintiff-appellant is ordered to be reinstated in his post with back wages. The plaintiff appellant shall

get his costs throughout from the respondent.

Appeal allowed.



## OBSERVATION

**Maharishi Dayanand University Act, 1975—Statute 22 of amended Schedule—Appointment of petitioner on temporary basis from 10th October 1984 to 31st March, 1985 after being selected by a duly constituted committee subject to approval by the University—No provision in the rules after amendment to take approval from the University—Effect—Appointment of petitioner held to be of continuous nature—Result—Termination set aside.**

## OBSERVED BY

**Mr. D. V. Sehgal**  
 Hon'ble Judge, Punjab and Haryana High Court

## IN

C. W. P. No. 3463 of 1985 Decided on 29th January, 1986, in the case of Dr. Sharda Verma Petitioner v. The Maharishi Dayanand University & anr, Respondents.

## IMPORTANT POINT

*Approval for appointment from the University is not required when the appointee teacher has been duly selected on merit by the Selection Committee.*

## TEXT

D. V. Sehgal, J.:—The petitioner holds Ph. D. Degree besides having qualifications of M. A. in Sanskrit, who in response to an advertisement in the "Indian, Express" dated September 25, 1984 applied for a post of lady Lecturer in Sanskrit at the Vaish Arya Maha Vidyalaya, Bhadurgarh, respondent No. 2. She was initially appointed on Temporary basis by respondent No. 2 vide orders dated 10th October, 1984, Annexure P. 1. Respondent No. 2 filed the Teachers' Return with the Maharishi Dayanand University, Respondent No. 1 recording the information of her

temporary appointment till the date permanent selection was held by a regularly constituted Selection Committee. Respondent No. 2 is a recognised College of respondent No. 1. It is a non Government institution affiliated to respondent No. 1. The services of its teachers are governed by the Acts & Statutes of respondent No. 1 as amended from time to time. Respondent No. 2 is also an aided institution and receives 95% of its approved deficit from the State Government. All the posts against which grant-in-aid is given are sanctioned by the State Gov-



ernment. The services of all employees of respondent No. 2 are governed by the Act providing for Security of Services of the aided educational institutions. The petitioner thus asserts that respondent No. 2 is amenable to writ jurisdiction of this Court in view of the law laid down by the Supreme Court in *Manmohan Singh v. Commissioner, Union Territory of Chandigarh* AIR 985 SC 349.

2. When the Selection Committee was duly constituted, the petitioner along with three other candidates for the post of lady Lecturer in Sanskrit appeared before it. The interview took place on November 19, 1984. The Committee selected her on merit. Comparative Chart showing the merit and the educational qualification of the petitioner vis-a-vis the other three candidates is appended with the petition as Annexure P. 3. The Selection Committee consisted of a nominee of the Vice Chancellor of respondent No. 1, one representative from the office of the Director, Public Instructions (Colleges), to experts in the subject and the Secretary of the College Management. The petitioner urges that on enquiries from different sources she found out that the Vice-Chancellor's nominee wanted to select Smt. Sheela Davi one of the other three candidates who was simply M. A. in Sanskrit. After a lot of tussle the petitioner was selected on merit because of her higher qualifications. She was issued an appointment letter dated November 21, 1984 by the Principal of

Respondent No. 2 to the effect that on the recommendation of the Selection Committee she had been appointed as Lecturer in Sanskrit w.e.f. 22-11-1984 (forenoon) on probation of one year. It was further mentioned in the said appointment letter that her appointment is subject to the approval of the University, Respondent No. 1. She states that She joined the College, and started working against one of the two sanctioned posts of Sanskrit Lecturers. However, a letter dated May 17, 1985, Annexure P. 5 was received from respondent No. 1 whereby she was informed that her appointment had been sanctioned on temporary basis with effect from October 10, 1984 to 31st March, 1985 as a special case. Respondent No. 1 further directed respondent No. 2 to re-advertise the post of Lecturer in Sanskrit. On receipt of the letter Annexure P. 5, the College authorities, respondent No. 2 informed her vide letter dated 22nd May, 1984, Annexure P. 6 that her services were no more required in view of the directions of the University. It was, however, mentioned that her case was being represented to respondent No. 1 for further consideration. When the college, respondent No. 2, re-opened after summer vacations, she again represented to respondent No. 2 urging them that she should be allowed to join her post. Respondent, No. 2 however, informed her letter dated July 13, 1985 Annexure P. 7 that University, respondent No. 1 had not taken any action on the issue as yet. She, therefore, could not be allowed to join duty. Aggrieved by the letter Annexure P. 5



whereby her appointment was treated on temporary basis and the subsequent communications Annexures P. 6 and P. 7 she filed the present writ petition with a prayer that a writ of certiorari to quash Annexures P. 5, P. 6 and P. 7 and a direction that the petitioner should be treated to be in continuous service as Lecturer in Sanskrit of College respondent No. 2 on regular basis be issued.

3. At the motion stage when notice of motion was issued to the respondents, there was no representation on behalf of respondent No. 1. However, counsel for respondent No. 2 put in appearance but did not file any written statement. After the writ petition was admitted fresh notice was issued to respondent No. 1 but no written statement on its behalf has been filed so far. To day, when the petition came up for final hearing, there was no representation on behalf of respondents Nos. 1 and 2.

4. Mr. J. L. Gupta, learned Senior Advocate, counsel for the petitioner asserts that despite the selection of the petitioner by the Selection Committee duly constituted under the statutes of the University, Respondent No. 1, on the basis of merit, her appointment has been wrongfully treated as on temporary basis from October 10, 1984 to 31st March, 1985 vide Annexure P. 5. The sole reason, according to him for the impugned action of respondent No. 1 is that the nominee of the Vice-Chancellor, respondent No. 1 wanted to appoint Smt Sheela Devi another candidate who

is admittedly less qualified than the petitioner Referring to the legal position, he asserted that Statute 28 contained in the Schedule to the Maharishi Dayanand University Act 1975 (hereinafter referred to as the Act), no doubt provided for approval of her appointment by respondent No. 1 Section 15 of the Act was amended vide Haryana Act No. 8 of 1983 with effect from December 20, 1983. Statute 28 which provided for the approval of the appointment of a teacher of a recognised College by respondent No. 1 after selection by the regularly constituted Selection Committee was deleted. No such provision now exists in the schedule to the Act. I have gone through the Schedule to the Act before its amendment. Statute 28 provided as under :—

“Statute 28 : (1) Teachers of the University shall be of the two classes namely :

(i) appointed teachers of the University

(ii) recognised teachers of the University.

(2) “Appointed teachers of the University” shall be either :

(a) servants of the University paid by the University and appointed by the Executive Council as Professors, Readers of lecturers or otherwise as teachers of the University ; or

(b) persons appointed by the Executive Council as Honorary Professors, Readers, Lecturers or otherwise as teachers of the Uni-



versity.

(3) "Recognised teachers of the University" shall be :

(a) members of the staff of a recognised College of the University or

(b) members of the staff of a recognised institution which provides graduate and post graduate courses of study approved by the University.

5. Provided that no such member of the staff of a recognised college or institution shall be deemed to be a recognised teacher unless—

(i) he is recognised by the Executive Council as Professor, Reader or in any other capacity as a teacher of the University ; and

(ii) his teaching in his own college or institution relating to graduate and post-graduate courses, is approved by the Executive Council on the recommendation of the Academic Council.

Notwithstanding anything contained in any other provision of a statute or an Ordinance, a recognised Professor Reader shall not be a member of the Academic Council, unless he is the Head of one of the University Teaching Departments. A teacher recognised as Professor or Reader appointed by the University shall however have the same privileges as those enjoyed by a Professor or Reader in so far as membership of the Board of Studies and the school of studies

and appointment as Head of the Department are concerned.

1. The qualifications of recognised teachers of University shall be such as may be determined by the Ordinances.

2. All applications for the recognition of teachers of the University shall be made in such manner as may be laid down by the Regulations made by the Executive Council in that behalf.

3. The period of recognition of a teacher of the University as Professor or Reader shall be determined by Ordinances made in that behalf. A person in the service of a college, recognised as a teacher of the University otherwise than as a Professor, Reader shall continue to be recognised so long as he is in the service of the college.

4. The Executive Council may, on a reference from the Vice-Chancellor, withdraw recognition of a teacher.

Provided that the teacher of the college concerned may, within a period of thirty days from the date of the order of withdrawal, appeal against the order to the Chancellor whose decision shall be final.

5. No person shall be appointed or recognised as a teacher of the University, except on the recommendation of Selection Committee constituted for the purpose, under the Statutes and the Ordinances.

6. A teacher, appointed by the University or by a College (excepting a college maintained by the Government), shall be entitled to leave, leave salary allowances, etc. as prescribed in this



behalf, by the Executive Council, and Provident Fund and other benefits as laid down in Statute 27 *ibid*.

7. The amended Schedule to the Act, however, contains Statute 22 which is in the following terms :

Selection Committee for appointment

“Statute 22(1) A selection committee shall consist of the following namely : –

- (i) The Vice-Chancellor;
- (ii) The head of the department concerned. However, when the Head of the department concerned happens to be of the rank of a Reader, the Dean of the Faculty concerned will be a member of the Committee in his place for the selection of the post of Professor (s).

(iii) (a) two outside experts in the case of selection of the principals of colleges and institutions maintained by the University, readers and lecturers and three in the case of professors, out of a panel prepared by the Academic Council and approved by the Chancellor;

(aa) The Principal of the college concerned, the head of the deptt. of the college, in the subject concerned and the head of deptt. of the subject concerned in the University in the case of selection of Lecturers of University maintained colleges.

(b) two persons not in the service of the University, to be nominated by the Executive Council, one of whom shall be a person out of four persons nominated by the Chancellor

to the Executive Council, in the case of selection of the Registrar, the Finance Officer and the Controller of Examinations;

(c) two persons not in the service of the University, who have special knowledge of the subject to be nominated by the Executive Council in the case of selection of Librarian;

(2) The Vice-Chancellor shall be the Chairman of the Selection Committee.

(3) The Registrar shall be the Secretary of the Selection committee.

(4) If all the required number of experts give their consent in writing to attend the meeting of the selection committee and if one of them does not turn up, the meeting of the selection committee shall be considered valid.”

7. Reference to Statute 22 of the amended Schedule, reproduced above, makes it clear there is no provision requiring approval of appointment of a lecturer of recognised college by the University, respondent No. 1, after the teacher has been duly selected on merit by the Selection Committee as provided by this statute. As at present advised, there being no representation on behalf of the respondents. I find that there is no escape from the conclusion that it was not necessary for respondent No. 2 to seek approval of respondent No. 1 to the appointment of the petitioner after she had been duly selected for the post of lady lecturer in Sanskrit and had been rightly appointed and placed on probation for a period of one year vide order



dated 21st November, 1984, Annexure P. 4. The letter Annexure P. 5 of respondent No. 1 approving her appointment on temporary basis with effect from 10th October, 1984 to 31st March 1985 is inconsequential and termination of her services as a result thereof by respondent No. 2 vide letter Annexure P. 6 is illegal.

8. I, therefore, allow this petition,

quash the orders Annexures P. 5, P. 6 and P. 7 and direct that the petitioner should be treated to be in service on a regular appointment as lecturer in Sanskrit and she should be granted all consequential reliefs to which she is entitled in accordance with law. There shall, however, be no order as to costs.

Petition allowed.



## OBSERVATION

**Karnataka State Universities Act, 1976 —Section 49- election of petitioner as Reader in Hindi by Selection Board but rejected by Chancellor —Validity— It is not valid—It is obligatory upon Chancellor to make appointment as per recommendation of the Board.**

## OBSERVED BY

Mr. N. D. Venkatesh  
Hon'ble Judge, Karnataka High Court

## IN

W. P. No. 9775 of 1980 decided on 12th March, 1986 in the case of Shankar Rao Petitioner v. The Chancellor, Karnataka University & Ors. Respondents.

## IMPORTANT POINTS

*It is obligatory for the Chancellor of the University to accept the recommendation of the selection board and make appointments accordingly.*

## TEXT

N.D. Venkatesh, J. :— Shankar Rao Maharudrappa Kappikeri of Dharwad has filed this petition under Article 226 of the Constitution of India for a writ of mandamus and/or other appropriate orders or directions. It is directed against the Chancellor, Vice-Chancellor and the Registrar of the Karnataka University, Dharwad who are respondents 1 to 3 respectively herein.

2. When this petition came up for hearing before the learned single Judge, Chandrakantharaj Urs. J., he referred the same for decision to a Division Bench, since in his view certain important question of law arise for consideration.

3. The petitioner was appointed as

a lecturer in Hindi in the Post-graduate Department at the Karnataka University Dharwad on 25-8-1971. A few posts of Readers and Lecturers in the University fell vacant during the years 1977 and 1979. On 25-4-1977 a notification was issued notifying the vacancy of one post of Professor in Hindi in the Post-graduate Department at Dharwad and one post of Reader also in Hindi in the Post-graduate Department at Gulbarga Centre. No further steps were taken on this notification. A second notification was issued on 4-4-1979 notifying vacancies of two posts of Readers in the Post-graduate Department of Hindi at Dharwad. By this time the petitioner had been transferred by



the University as a Lecturer in the Post-graduate Department of Hindi at its Gulbarga Centre. He had applied not merely to the post of Professor in Hindi but also to one of the post of Readers. A Board of Appointment was constituted to make selections on the posts notified in the aforesaid two notifications. It selected the petitioner to the post of Reader in Hindi at the Post-graduate Centre at Gulbarga. However, the Chancellor did not appoint him as Reader on the ground that the petitioner did not have the requisite qualifications for the post.

4. The petitioner's request in this petition is for an appropriate direction to the respondents to appoint him as Reader in the Post-graduate Department of Hindi at the Gulbarga University which has since come into being.

5. The learned counsel for the petitioner submitted that his client had all the requisite qualifications for being appointed as Reader in Hindi in the Post-graduate Department at Dharwad and that since he had been selected by the Board, the Chancellor could not but have approved his selection. The Chancellor, he submitted, in the circumstances, had committed an error in not approving the list and therefore an appropriate direction by the Court was required to be issued.

6. On the other hand Sri Chandrasekhariah, learned Government Advocate, who is appearing for the first respondent, contended that the petitioner did not have the requisite qualifications for the post and further sub-

mitted that in a given case the Chancellor can exercise his discretion and decline to approve the list or a part of the list sent by the Board.

7. Since similar questions have arisen in two other writ appeals (W. A. 337/85 and 1919/85), the counsel appearing in those appeals were also asked by the Court to make their submissions in the matter. Accordingly, we have heard Sriyuths. M. R. Janardhana, P. Vishwanatha Shetty and H. S. Jois. Sri Janardhana and Sri Vishwanatha Shetty took the stand that the Chancellor in the matter had no discretion but to go by the select list submitted to him by the Board, if in making the selection the Board had complied with the relevant provisions of the Act or Statutes, if any. Sri H. S. Jois, on the other hand, argued that even in such a case the Chancellor has powers to reject the select list, either fully or in part.

8. Three Universities, the University of Bangalore, the University of Karnataka and the University of Mysore were established under a common Universities Act known as the Karnataka State Universities Act, 1979 (the Act). Subsequent to the filing of this petition, by Karnataka Act No. 25/80, the Act came to be suitably amended providing for the establishment of two more Universities, one at Gulbarga known as the Gulbarga University and the other at Mangalore, known as the Mangalore University. The Gulbarga University has its jurisdiction over the areas comprising of the Districts of Bellary, Bidar Gulbarga and Raichur.



It may be noted that these four districts originally fell within the jurisdiction of the Karnataka Universities.

9. Broadly speaking the administration of these Universities, in different measures and at different levels, vests with the categories of statutory Authorities known as The Officers and The Authorities of the University.

10. Chapter III of the Act containing Sections 9 to 10 deals with the Officers of the University. Section 9 names 8 such Officers and confers an enabling power on the Chancellor to name and designate any other officer, if so recommended by the Vice-Chancellor. It may also be noted that the Chancellor is himself one such Officer named in Section 9.

11. Chapter IV containing as it does Sections 20 to 34A deals with the Authorities of the University. The Authorities are the Senate, The Syndicate, The Academic Council, The Finance Committee, The Board of Studies, the Faculties, and such other bodies as by statutes may be declared to be the Authorities of the University.

12. Since we are concerned in this proceeding with the question of appointment of the petitioner to one of the teaching posts in the University, let us examine the relevant provisions of the Act which deal with the modalities and procedure in the matter of selection and appointment to teaching posts. It is Chapter VIII of the Act that deals with the appointment of teachers and other servants of the University. In this chapter fall Sections 49 to 52. It is Section

49 that deals with the appointment of Professors, Readers, Lecturers and the Librarian of the University. Section 49 is relevant for our purpose. That reads as under :

“49. Appointment of Teachers, etc. (1) There shall be a Board of Appointment for selecting persons for appointment as Professors, Librarian, Readers and Lecturers in the University.

(2) Every such Board shall consist of—

(a) for selections to the posts of Professors and to the post of Librarian.

(i) the Vice-Chancellor Ex-Officio Chairman ;

(ii) the Head of the Department concerned, if he is a Professor and if he is not a Professor, a professor from any other University in the State, nominated by the Chancellor and where no such Professor is available in University within the State, such Professor in the concerned Department from a Central Institute within the State or from a University in any other State nominated by the Chancellor.

(iii) three experts nominated by the Chancellor, two of whom from a panel furnished by the University Grants Commission and the other from amongst persons serving in any University established by law in India or any other institution recognised by the State Government.

(b) for selections to the posts of Readers and Lecturers.



(i) the Vice-Chancellor Ex Officio Chairman ;

(ii) two experts nominated by the Chancellor ;

(iii) the Head of the Department concerned if he is a Professor, and if he is not a Professor, a Professor in the concerned Department of any other University in the State nominated by the Chancellor and where no such Professor is available in any University within the State such Professor in the concerned department from a Central Institute within the State or from a University in any other State nominated by the Chancellor.

(iv) one Professor from any other University in the State nominated by the Chancellor where the Head of Department concerned is not a Professor.

(3) The Registrar shall act as the Secretary of the Board of Appointment.

(4) Every post of Professor, Librarian, Reader or Lecturer to be filled by selections shall be duly and widely advertised together with the minimum and other qualifications, if any, required, the emoluments and the number of posts to be filled, and reasonable time shall be allowed within which the applicants may apply.

(5) The quorum for a meeting of the Board of Appointment shall be four of whom in the case of selections to the posts of Professors and the Librarian at least two shall be

the experts and in the case of selections to the other posts, at least one shall be the expert.

(6) The Board shall interview, adjudge the merit of each candidate in accordance with the qualifications advertised and prepare a list of persons selected arranged in the order of merit. It shall forward the list to the Chancellor who shall make appointments in accordance with the same.

Explanation—Nothing in this sub-section shall be construed as requiring the Chancellor to make appointments in accordance with the list where he is of the opinion that it does not satisfy the provisions of this Act or the statutes relating to such appointments.

(7) In preparing the list under sub-section (6) the Board shall follow the orders issued by the State Government from time to time in the matter of reservation of posts for the Scheduled Castes, the Scheduled Tribes and other backward classes of citizens.

(8) Notwithstanding anything in sub-section (7), preference shall be given to persons belonging to the Scheduled Castes and the Scheduled Tribes in any selection if in the opinion of the Board such persons possess merit a little above the minimum qualification prescribed and are suitable.

(9) Notwithstanding anything in the preceding sub-sections, appointments to the posts of Professors



and Readers in under-graduate colleges maintained by the University shall be made by such authority as may be prescribed in the Statutes by promotion on the basis of seniority-merit from Readers and Lecturers respectively.

Provided that whenever any new subject is introduced, appointment of Professors, Readers and Lecturers in such new subject shall be made in such manner as may be prescribed by Statutes."

13. Section 49 contemplates the constitution of a Board of Appointment to make selections to the posts of Professors, Readers, Lecturers and Librarian of the University. To make selections to the posts of Readers and Lecturers, the Board constituted should consist of the Vice-Chancellor, two experts nominated by the Chancellor, the Head of the department concerned, if he is a Professor, and, if not, a Professor in the concerned department of any other University nominated by the Chancellor and if no such Professor is available such Professor in the concerned Department from a Central Institute within the State or from a University in any other State to be nominated by the Chancellor, one Professor from any other University in the State nominated by the Chancellor where the head of the Department concerned is not a Professor. The Vice-Chancellor is the Ex-Officio Chairman of the Board and the Registrar of the University, its Secretary. The vacancies will have to

be duly and widely advertised indicating therein the minimum and other qualifications and other requisite information re-emoluments etc., (sub-section 4). Sub-section (5) provides for the quorum of the meeting Sub-section (6) mandates that the Board should interview the candidates, adjudge the merit of each candidate and should prepare a list of persons selected arranging the same in the order of merit and shall forward the list to the Chancellor." As further provided in that very provision, the Chancellor "shall make appointments in accordance with the same."

14. Let us now see the qualifications prescribed for the post of Reader in Hindi of the University. The qualifications were :

"(i) A Doctor's degree or research work of an equality high standard; and

(ii) Consistently good academic record with 1st or high 2nd Class (B in the seven point scale) Master's degree in relevant subject or an equivalent degree of a foreign University.

Having regard to the need for developing inter-disciplinary programme, the degree in (i) and (ii) above may be in relevant subjects.

Provided that if the selection committee is of the view that the research work of a candidate as evident either from his thesis or from his published work is of very high standard it may relax any of the qualifications prescribed in (ii)



above.

Provided further that if a candidate possessing a Doctor's degree or equivalent research work is not available or is not considered suitable, a person possessing a consistently good academic record (weightage being given to M. Phill. or equivalent degree to research work of quality) may be appointed provided he has done research work for at least two years or has practical experience in a research laboratory organisation on the condition that he/she will have to obtain a Doctor's degree or give evidence or research work of equivalent high standard within five years of his/her appointment, failing which he/she will not be able to earn future increments until/she fulfils these requirements.

(iii) Five years teaching experience to Post-graduate classes/Research and evidence of having done independent research."

15. The Board of Appointment constituted to make selections for the posts notified in the aforesaid notifica-

#### READERS (Three posts)

Karnataka University Post-graduate Department, Dharwad.

1. Dr. C.G. Dubey, M.A., Ph. D. Litt. 19 years of P G. teaching experience and produced 7 Ph. Ds. and published research work of High quality (next stage in the scale of Reader as per rules)

2. xxx xx xx xx

tions met, interviewed and after adjudging the merit of each candidate, prepared a select list and forwarded the same to the Chancellor as provided under sub-section (6) of Section 49. In that list it recommended the case of the petitioner for the appointment as Reader in Hindi at the Post-graduate Centre of Dharwad University at Gulbarga. The recommendation of the Board in so far as it concerned the Petitioner reads thus :

#### "KARNATAKA UNIVERSITY DHARWAD

No. K. EST (T)

18-12-1979.

For the post of Readers in Hindi, we interviewed in all 19 persons who appeared for the interview and after carefully going through their qualifications, Teaching experience, Research work and the performance at the interview, we are of the view that the following are suitable for the post and unanimously recommend that they be appointed on the salary mentioned against their names:

Post-graduate Centre, Gulbarga.

1. Sri S.M. Kappikeri, M.A., with 16 years of Post-graduate teaching experience and published research work of high standard (next stage in the scale of Reader as per rules).

3. xxx xx xx xx"



16. The Chancellor, as stated above, declined to appoint the petitioner as Reader as recommended by the Board for the reason that the petitioner did not have the necessary qualifications prescribed for the post. Elaborating this fact, it has been stated in the statement of objections of the first respondent as under :

"The petitioner is a B.A. with an ordinary pass class and M.A. in II Class. He does not possess a Doctorate and his research output is reported to be not of very high standard. Therefore, he does not fulfil the first two of the qualifications mentioned above. Besides, there were several better qualified candidates than the petitioner and it was therefore that the Chancellor could not, persuade himself to approve of the petitioner's appointment"

17. Now, the questions that arise for consideration are :

(i) Did not the petitioner have the requisite qualifications for being appointed to the post of Reader in Hindi ?

(ii) Even if had such qualifications and had been selected by the Board of Appointment, could the Chancellor, exercising his discretion in the matter have declined to appoint him for the post?

18. For being selected to the post of Reader, the concerned candidate should have taught post-graduate students at least for 5 years and should have

had evidence of having done independent research work (qualification-iii). The Board had found him having had 16 years Post-graduate teaching experience and had further found him having published research work of high standard.

He should have had a Doctor's degree or in the alternative Research work of equally high standard to his credit (qualification-i). The Board found him having published Research work of high standard, as already stated.

The only remaining qualification was that he should have had consistently good academic record with first Class or high Second Class Master's degree (qualification-ii). But the proviso to the second qualification says that if the selection committee is of the view that the Research work of a candidate as evident either from his thesis or from his published work is of very high standard, it may relax any of the qualifications prescribed in (ii) above. The very fact that the Board had recommended the name of the petitioner taking into consideration his teaching experience and his Research out-put clearly shows that it had relaxed the second qualification.

19. It is thus clear that the petitioner did have the necessary qualifications for the post and the Board had also found him having had the qualifications prescribed in the notification.

20. While rejecting the recommendations of the Board of Appointment, the first respondent appears to have made his own assessment as to the merits of the candidate (the petitioner).



According to the first respondent, the Research-out put of the petitioner as reported to him was not of a very high standard. He is further of the view that there were several better qualified candidates than the petitioner for the said post. As already stated, the learned Government Advocate submits that the Chancellor, exercising his Powers, can reject the recommendations of the Board even if the Board had found the candidate qualified for the post.

21. In order to appreciate this contention, we should know the source and ambit of the power of the Chancellor in dealing with University matters. This necessarily leads us for a consideration of the relevant provisions of the Statute. Section 10 of the Act which deals with the appointment of the Chancellor and his powers reads thus;

- “10. The Chancellor.....(1) The Governor of Karnataka shall by virtue of his office, be the Chancellor of the University.
- (2) He shall be the Head of the University and shall when present, preside at the meetings of the Senate and at any Convocation of the University.
- (3) He shall have such other powers as may be conferred on him by or under this Act or the Statutes.”

(underlining supplied)

He is the Head of the University and indeed a very high functionary. And

when present at the meetings of the Senate and at the Convocations of the University, he will have the right to preside over those Bodies. In so far as his other power touching the internal administration of the University are concerned what sub-section (3) of Section 10 says is that “he shall have such other powers as may be conferred on him by or under this Act or the Statutes.”

22. The Chancellor being the creation of a Statute, his powers are circumscribed by the Statute that has created his office. Whatever power that office is invested with has necessarily to be found only within the four corners of that Statute. The Act has not conferred upon him any inherent powers much less any discretionary powers. Sub-section (6) of section 49 of the Act says that when the list is forwarded to him by the Board of Appointment the Chancellor, “shall make appointments in accordance with the same.” It is thus obligatory for the Chancellor to accept the recommendation and make appointments accordingly. He is an appellate authority over the decision of the Board. Nor is he a revising authority to take a decision of his own. He can, however, refuse to act on the recommendation, if he finds that in making the recommendations, the Board had violated the provisions of the Act or Statutes, or the candidate recommended expressly lacked the prescribed qualifications.

This view of ours also finds support



from the explanation added to sub-sec. (6) of Sec 49 of the Act by Karnataka Act No. 25/1980. As observed by the Supreme Court in *Bihta Co-operative Development and Cane Marketing Union Ltd. and another v. Bank of Bihar and Ors.* AIR 1967 SC 389 an explanation to a provision "must be read so as to harmonise with and clear up any ambiguity in the main section and it should not be so construed as to widen the ambit of the section."

In *Venkataratnam A.V. v. Chancellor, University of Mysore & Another* 1981(1) Ker, L.J. 423. a similar question came up for consideration. There Rama Jois, J., observed that "in the absence of any illegality which vitiates the selection, the Chancellor cannot sit in judgment over the merits of the selection made by the Board and take a contrary view regarding the suitability of a candidate selected by the Board of appointment." The learned Judge further observed that "in the absence of any procedural irregularity or want of qualification or existence of disqualification in the selected candidate, section 49 (6) of the Act creates a right in favour of a candidate selected by the Board to be appointed and a corresponding duty on the part of the Chancellor to appoint a candidate selected for the post for which the appointment was intended". we are in entire agreement with this view. The Board has to consist of experts or specialists (Professor) in that particular branch or subject. In academic matters the opinion of such experts who are more familiar with the

subjects and persons has to take precedence. Secondly, it would be proper and safe for the Chancellor to act on the advice of the Committee of experts. The Governor, who by virtue of his office has been appointed as the Chancellor, is also the highest dignitary and constitutional authority in the State. The Legislature perhaps intended that he should not be dragged into any controversy in the matter of appointments to Universities

23. For reasons stated above, we are of the view that the petitioner is entitled to the relief sought for by him.

24. Subsequent to the filing of this petition a separate University at Gulbarga came to be constituted under the Act and the Post-graduate Centre in Hindi at Gulbarga which was under the Karnataka University now stands transferred to the Gulbarga University. Therefore, that University has been subsequently arrayed as the 5th respondent. It appears that in the month of March, 1982, the 6th respondent has been appointed as Reader in Hindi in the post in question. Earlier to that on 7-7-1980. the learned single Judge had made an interim order in the writ petition that any selection or appointment made to the post during the pendency of the writ petition would be subject to the decision in the petition. That fact has been again reiterated on 4-11-1981 (by a separate order). The petitioner. had been selected by the Board of Appointment to the Post of Reader in Hindi at the Post-graduate Centre at Gulbarga



**N. D. Venkatesh**  
**Judge**  
**Karnataka High Court**

In view of subsequent development, we have to suitably mould the relief to be granted in the petition.

25. Accordingly we make the following Order.

- (i) Writ petition is allowed;
  - (ii) Rule made absolute;
  - (iii) A writ in the nature of manda-
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mus shall issue to the 1st respondent to appoint the petitioner as Reader in Hindi in the post-graduate Department of Hindi at the Gulbarga University, Gulbarga;

(iv) Parties are directed to bear their own costs.

Petition allowed









ಗ್ರಂಥಾಲಯ  
ಮಾಲ್ ಭಾಗ್, ಬೆಂಗಳೂರು

ಲಾಲ್‌ಬಾಗ್, ಬೆಂಗಳೂರು - 560 004

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ವ.ಸಂಖ್ಯೆ:.....

ಈ ಕೆಳಗೆ ಕಾಣಿಸಿರುವ ದಿನದಂದು ಅಥವಾ ಅದಕ್ಕೂ ಮುಂಚೆ ಈ ಪುಸ್ತಕವನ್ನು ಹಿಂದಿರುಗಿಸಬೇಕು. ಅಥವಾ ಮುಂಚಿತವಾಗಿ ನವೀಕರಿಸಬೇಕು. ಇಲ್ಲದಿದ್ದರೆ ಒಂದು ದಿನಕ್ಕೆ ರೂ.1.00 ದಂಡ ಕೊಡಬೇಕಾಗುತ್ತದೆ.

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ಪು.ತಿ.ನೋ..



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